

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

<p>CELIA BURNETT, Plaintiff,</p> <p>vs.</p> <p>JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.</p>	<p>MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR AMENDMENT TO JUDGMENT UNDER RULE 59(e)</p> <p>Case No. 1:04-CV-161 TS</p>
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This matter is before the Court on Plaintiff's Motion for Amendment to Judgment Under Rule 59(e),¹ filed April 25, 2006. Defendant filed her response May 9, 2006,² and Plaintiff's reply was filed on May 22, 2006.³ Having reviewed the file, the pleadings and being otherwise fully informed, the Court will deny Plaintiff's Motion, as set forth more fully below.

¹ Docket No. 26.

² Docket No. 29.

³ Docket No. 30.

DISCUSSION

Plaintiff brings her Motion under Fed. R. Civ. P. 59(e), and the Court notes that it is timely filed. Rule 59(e) provides a manner in which to alter or amend a judgment. However, Plaintiff is requesting that she be allowed to brief the case, and argues that her previous failure to do so was the result of inadvertence on her counsel's part. This Court believes that the substance of Plaintiff's Motion more accurately lends itself to one brought pursuant to Fed. R. Civ. P. 60(b), which provides that a party may be relieved from a final judgment in certain circumstances, including inadvertence and excusable neglect. Therefore, the Court construes Plaintiff's Motion as one brought pursuant to Rule 60(b).

Under either rule or standard, the Court finds Plaintiff's Motion to be without merit. As was detailed in the Court's April 11, 2006 Memorandum Decision and Order Granting Defendant's Motion to Dismiss,⁴ Plaintiff filed this case in November of 2004. After a scheduling order was entered, there were seven additional extensions granted over a six-month period. However, no substantive pleading was ever filed by Plaintiff. Defendant filed a Motion to Dismiss on December 5, 2005, to which no response was ever filed by Plaintiff. The Court waited over four months and, on April 11, 2006, the Court granted the Motion to Dismiss, pursuant to DUCivR 7-1(d) and Fed. R. Civ. P. 41(b) for failure to prosecute. The instant motion followed.

The fact that Plaintiff repeatedly filed for extensions of time demonstrates that she was aware of her deadlines. Plaintiff's counsel's arguments that a member of his staff was ill for an

⁴ Docket No. 25.

extended period, or that his client is arguably disabled, do not relieve counsel of his own responsibility to adequately prosecute this case, to respond to scheduling orders of the court, or to respond to motions by the opposing party. In fact, it could be argued that those factors set forth as excuses for relief in this case actually imposed upon Mr. Borsos an increased duty to ensure that this case was adequately litigated.

Plaintiff's counsel cannot shift responsibility by blaming his own staff for his failure to prosecute this case. Although Mr. Borsos argues that he was awaiting materials from his assistant, and that she had the transcript, he has offered no explanation for why he failed to respond at all to Defendant's Motion to Dismiss, which did not require any of the materials he was supposedly awaiting.

The Court is simply unpersuaded that, in the approximately 18-month life-span of this case prior to dismissal, there was no opportunity for Plaintiff's counsel to comply with his obligations to his client and to the Court.

The Court also notes that Mr. Borsos has apparently had a history of similar problems of failing to adequately respond, and he has received financial sanctions from other judges in this Court. Such sanctions have not resulted in the desired effect – bringing Mr. Borsos into compliance with Court rule. While the Court will not impose an additional sanction against Mr. Borsos in this case, the Court's Order of dismissal will stand.

Plaintiff has failed to meet her burden of persuading this Court – under either Rule 59(e) or 60(b) – that she is entitled to relief from the judgment entered. The utter failure of filing any

substantive response in this case over an 18-month period was not the result of mistake or excusable neglect, and the Court finds no other grounds which would merit such relief.

CONCLUSION

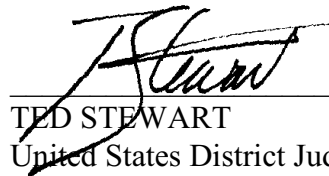
Based upon the above, it is hereby

ORDERED that Plaintiff's Motion for Amendment to Judgment Under Rule 59(e), and construed as brought pursuant to Rule 60(b), is DENIED. The Court's prior Order will not be amended or set aside, and this case is closed.

SO ORDERED.

DATED September 15, 2006.

BY THE COURT:

A handwritten signature in black ink, appearing to read "T. Stewart", is written over a horizontal line.

TED STEWART
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DIVISION

District of

UTAH

UNITED STATES OF AMERICA

V.

JENNY LEE DUDDLESTON

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX 105CR000080-001

USM Number: 12796-081

James C. Bradshaw

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm		1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/14/2006

Date of Imposition of Judgment

Signature of Judge

Ted Stewart

Name of Judge

U. S. District Judge

Title of Judge

Date

9/15/2006

DEFENDANT: JENNY LEE DUDDLESTON
CASE NUMBER: DUTX 105CR000080-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

51 months

☒ The court makes the following recommendations to the Bureau of Prisons:

Incarceration in Phoenix, AZ

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JENNY LEE DUDDLESTON
CASE NUMBER: DUTX 105CR000080-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JENNY LEE DUDDLESTON
CASE NUMBER: DUTX 105CR000080-001

ADDITIONAL SUPERVISED RELEASE TERMS

- 1) The defendant will submit to drug/alcohol testing as directed by the probation office, and pay a one-time \$115 fee to partially defer the costs of collection and testing. If testing reveals illegal drug use or excessive and/or illegal consumption of alcohol such as alcohol-related criminal or traffic offenses, the defendant shall participate in drug and/or alcohol abuse treatment under a copayment plan as directed by the United States Probation Office and shall not possess or consume alcohol during the course of treatment, nor frequent businesses where alcohol is the chief item of order.
- 2) The defendant shall participate in a mental health treatment program under a copayment plan as directed by the probation office, take any mental health medications as prescribed, and not possess or consume alcohol, nor frequent businesses where alcohol is the chief item of order, during the course of treatment or medication.
- 3) The defendant shall refrain from incurring new credit charges or opening additional lines of credit unless she is in compliance with any established payment schedule and obtains the approval of the probation office.
- 4) The defendant shall submit her person, residence, office, or vehicle to a search, conducted by the United States Probation Office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JENNY LEE DUDDLESTON
CASE NUMBER: DUTX 105CR000080-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
- Payment of \$500 fine will be made in accordance with a schedule established by the Bureau of Prisons Inmate Financial Responsibility Program while incarcerated, and the United States Probation Office following release from incarceration.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

PHILLIP M. ADAMS & ASSOCIATES, L.L.C., a
Utah Limited Liability Company,

Plaintiff,

vs.

DELL, INC., FUJITSU LIMITED,
FUJITSU COMPUTER SYSTEMS CORP.,
INTERNATIONAL BUSINESS MACHINES
CORP., LENOVO GROUP LTD.,
MPC COMPUTERS, LLC, AND
SONY ELECTRONICS INC.,

Defendants.

MEMORANDUM DECISION AND
ORDER

GRANTING IN PART PLAINTIFF'S
MOTION TO COMPEL COMPLETE
ANSWERS TO INTERROGATORY
NO. 14, AND FOR A FINDING THAT
RULE 33(d) DOES NOT APPLY

AND
GRANTING IN PART
DEFENDANTS' MOTION TO
COMPEL INTERROGATORY
RESPONSES

Civil No. 1:05-CV-64 TS
District Judge Ted Stewart
Magistrate Judge David Nuffer

Plaintiff Phillip M. Adams & Associates, L.L.C. (Adams) alleges the Defendants, some of the largest manufacturers of computers, have infringed on three of its patents related to errors in floppy disk controllers.¹ Adams alleges the infringement occurs in many specified models of Defendants' computers.²

In the early stages of the case, disputes have arisen as to the gathering of preliminary information. Adams wants to know the field of play – which of Defendants' many computer

¹ Amended Complaint at 2, docket no. 6, filed May 31, 2005.

² *Id.* at 8.

models may have infringing components – while Defendants want Adams to reveal the evidence Adams now has of infringement.

Plaintiff's Motion to Compel

Plaintiff Adams moved to compel³ all Defendants to answer its Interrogatory No. 14,⁴ seeking information on their product sales. Adams withdrew the motion, first as to Lenovo and MPC,⁵ and then as to Fujitsu, saying they have complied with Plaintiff's request.⁶ IBM eventually answered most of Adams' Interrogatory No. 14 on July 21.⁷ “Dell has provided the

³ Docket no. 123, filed July 6, 2006.

⁴ INTERROGATORY NO. 14

Please (a) identify all of the products that you import, make, use, sell or offer for sale and that include a Floppy Disk Control (FDC); (b) identify all of the products that you import, make, use, sell or offer for sale and that include a Super I/O (SIO) device; (c) identify all of the products that you import, make, use, sell or offer for sale and that include a Bridge Chip with an integrated Super I/O (SIO) device; (d) identify the FDCs used in the products identified in part (a) above; (e) identify the manufacturers of those FDCs; (f) identify the SIOs used in the products identified in part (b) above; (g) identify the manufacturers of those SIOs; (h) identify the Bridge Chips used in the products identified in part (c) above; and (i) identify the manufacturers of those Bridge Chips. State the number of each product identified in part (a) above that you have imported, made, used, sold or offered for sale. State the number of each product identified in part (b) above that you have imported, made, used, sold or offered for sale. State the number of each product identified in part (c) above that you have imported, made, used, sold or offered for sale.

The Interrogatory is reproduced in full in Plaintiff's Memorandum in Support of Motion to Compel Complete Answers to Interrogatory No. 14, and for a Finding that Rule 33(d) Does Not Apply (Adams' Supporting Memorandum 124) at 2, docket no. 124, filed July 6, 2006. The actual interrogatories to Defendants are attached as Exhibits C-F to Memorandum 124.

⁵ Notice of Withdrawal of Adams' Motion to Compel as to Lenovo and MPC but Not the Other Defendants, docket no. 138, filed July 25, 2006.

⁶ Notice of Withdrawal of Adams' Motion to Compel as to Fujitsu Limited and Fujitsu Computer Systems Corp. but Not the Other Defendants, docket no. 142, filed August 1, 2006.

⁷ Adams' Reply to IBM's Opposition to Adams' Motion to Compel Complete Answers to Interrogatory No. 14, and for a Finding that Rule 33(d) Does Not Apply (Adams' Reply Memorandum 143) at 2, docket no. 143, filed August 2, 2006. IBM's Opposition to Adams' Motion to Compel Complete Answers to Interrogatory No. 14, and for a Finding that Rule 33(d) Does Not Apply (IBM's Opposition Memorandum 136) at 2-6, docket no. 136, filed July 24, 2006.

technical information requested in Interrogatory No. 14 in the form requested by Adams,”⁸ but like IBM has withheld some information.

Some defendants objected to providing information beyond the limited list of accused products Adams identified in the Amended Complaint, but later recognized that Adams is entitled to take discovery of the scope of the alleged infringement and is not required to identify each model of infringing computer before filing suit.⁹

Some Defendants object that the industry-standard terminology of this interrogatory is vague or ambiguous. The satisfactory answers of many industry-leader Defendants disprove this objection.

Some Defendants attempted to invoke Fed. R. Civ. P. 33(d) rather than provide narrative answers or tabular answers. That rule permits a party to forego a narrative interrogatory answer if the answer may be derived or ascertained from business records *and* if the burden of deriving or ascertaining the answer is substantially the same for both parties. All responding parties have now provided tabular, summary information.

Pending Objections

IBM and Dell also objected to the interrogatory insofar as it requested *damages* information. Under the court’s scheduling order¹⁰ (entered on stipulation¹¹), damages discovery is deferred until after liability discovery. Plaintiff’s Interrogatory No. 14 asks for

⁸ Dell’s Memorandum in Opposition to Adams’ Motion to Compel Complete Answers to Interrogatory No. 14, and for a Finding that Rule 33(d) Does Not Apply (Dell’s Opposition Memorandum 141) at 3, docket no. 141, filed August 1, 2006.

⁹ See authorities cited in Adams’ Supporting Memorandum 124, at 4.

¹⁰ Docket no. 112, filed June 5, 2006.

¹¹ Docket no. 108 at 7, filed May 22, 2006.

“the number of each product identified . . . above that you have imported, made, used, sold or offered for sale.” IBM and Dell claim this is *damages* information.¹²

But Adams points out sales numbers are hardly a start on damages discovery. “If Adams were seeking pure damages discovery, Adams would ask for much more information, including profits, costs, licensing rates and pricing information.”¹³ The raw sales numbers have legitimate uses at this early stage, including winnowing out minor third party suppliers to focus the litigation;¹⁴ potential rebuttal of an obviousness assertion;¹⁵ and to facilitate settlement.¹⁶ IBM and Dell should answer this part of the Interrogatory.

Defendants’ Motion to Compel

Defendants have moved to compel Adams to respond to Defendants’ interrogatories which request information regarding the basis for Adams’ claims of infringement.¹⁷ While each Defendant’s interrogatories may vary, they are similar to those propounded by Fujitsu:

Identify each product of Fujitsu that you contend infringes the Adams Patents, and for each product provide (1) its identity by model number or trade name, (2) the identity (by manufacturer, number, and version designation) of each component that you contend infringes the Adams patents, including but not limited to FDC chips and Super I/O chips, and (3) an explanation of when and how the alleged infringement of each product and/or each component came to your attention.
and
Identify each claim of the Adams Patents that Adams asserts is infringed by Fujitsu, and for each such claim provide a claim chart that identifies on an element by element basis any allegedly infringing structure of and allegedly infringing steps performed by each Fujitsu product identified in your answer to Interrogatory No. 1, and state whether the alleged infringement is literal or under the doctrine of equivalents.¹⁸

¹² Dell’s Opposition Memorandum 141, at 2-3, 8-9; IBM’s Opposition Memorandum 136, at 6-8.

¹³ Adams’ Reply Memorandum 143, at 2.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 2-4.

¹⁶ *Id.* at 4.

¹⁷ Defendants’ Motion to Compel Interrogatory Responses, docket no. 130, filed July 21, 2006.

¹⁸ Memorandum in Support of Motion to Compel Interrogatory Responses (Defendants’ Supporting Memorandum 131) at iv, docket no. 131, filed July 21, 2006.

Adams objects that the interrogatories are “premature,” stating that Adams will not respond until each Defendant produces “discovery regarding what products use the technology as well as technical information regarding those products.”¹⁹

Defendants say “Adams should not be permitted to rely on discovery to formulate after-the-fact infringement contentions that should have been formulated before filing this case.”²⁰

Defendants say they are looking for “Adams’ Rule 11 basis for its infringement allegations,”²¹ “which a plaintiff must gather *prior* to filing a complaint.”²²

The “who goes first” discussion permeates the memoranda:

Defendants:

Adams recently served broad interrogatories seeking information regarding the allegedly infringing devices, and filed a motion to compel defendants to provide information regarding *every single one of their products* that contains an FDC — even those as to which Adams has articulated no infringement position, which include the vast majority of defendants’ products.²³

Thus, Adams is blatantly seeking to improperly use discovery to develop infringement contentions now — over a year after it filed the lawsuit — as to many of the products accused in the Amended Complaint that should have been investigated prior to filing this action. Adams should not be permitted to do so.²⁴

Adams:

Adams does not assert that it should not answer these interrogatories, but it should answer them after defendants and their suppliers provide microcode and other information on their FDC chips and their computer products.²⁵

¹⁹ Plaintiff’s Response To Defendants Fujitsu Limited And Fujitsu Computer Systems’ First Set Of Interrogatories at 5, Exhibit H to Defendants’ Supporting Memorandum 131. Similar response was made to discovery from other Defendants. *See* Exhibits G, J, I, K and L to Defendants’ Supporting Memorandum 131.

²⁰ Defendants’ Supporting Memorandum 131, at 2.

²¹ *Id.* at iii.

²² *Id.* at v.

²³ *Id.* at 3

²⁴ *Id.* at 5.

²⁵ Adams’ Opposition to Defendants’ Motion to Compel Interrogatory Responses (Adams Opposition Memorandum 144) at 4, docket no. 144, filed August 3, 2006.

Adams has requested that defendants provide discovery on which products use FDC chips as well as technical information from those products and chips. Defendants have not provided all the necessary information. This information is necessary for Adams to create complete and accurate claim charts.²⁶

The parties also “talk past” each other when discussing what is sought. Adams thinks the Defendants want claim charts, which Adams says he cannot provide now. “Adams cannot produce the claim charts or contentions that the defendants seek.”²⁷

Defendants say “this is not what Defendants seek. As explained in their Motion, at this point in the litigation, Defendants seek Adams’s infringement contentions *only as to the accused devices identified by Adams in its pleadings*.”²⁸

Adams has produced claim charts from a related case to the Defendants and says “[t]hose claim charts provide a clear picture of Adams’ allegations of infringement. It does not require a great deal of imagination for the defendants to apply those claim charts to their products [T]he defendants in this case use the same type of chips [that Gateway used] in their computers.”²⁹

Defendants, however, are not as clear on this point. They say “[f]ive of the Defendants (Dell, Lenovo, Sony, Fujitsu Limited, and Fujitsu Computer Systems) did not identify the Winbond Rev G chip [used by Gateway] *anywhere* in their responses. . . . As to the remaining Defendants, most of the products specifically accused by Adams likewise do *not* contain the Winbond Rev G chip.”³⁰

²⁶ *Id.* at 8.

²⁷ Adams’ Opposition Memorandum 144, at 3.

²⁸ Reply 148, at 1.

²⁹ Adams’ Opposition Memorandum 144, at 4.

³⁰ Reply Memorandum in Support of Motion to Compel Interrogatory Responses (Defendants’ Reply Memorandum 148) at 4-5, docket no. 148, filed August 17, 2006 (footnotes omitted).

Defendants help the court understand what they seek by pointing to the practices of other districts. “Several districts routinely *require* the disclosure of preliminary infringement contentions, including claim charts, soon after the case is filed.”³¹ District Judge Tena Campbell in this district also requires a party claiming infringement to serve a “Disclosure of Asserted Claims and Preliminary Infringement Contentions” separately, for each opposing party, not later than 10 days after the Initial Pretrial Conference.³² This must include:

- (a) Each claim of each patent in suit that is allegedly infringed by each opposing party;
- (b) Separately for each asserted claim, each accused apparatus, product, device, process, method, act, or other instrumentality (“Accused Instrumentality or Device”) of each opposing party of which the party is aware. This identification shall be as specific as possible. Each product, device, and apparatus must be identified by name or model number, if known. Each method or process must be identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process;
- (c) A chart identifying specifically where each element of each asserted claim is found within each Accused Device, including for each element that such party contends is governed by 35 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in the Accused Device that performs the claimed function;
- (d) Whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Device;
- (e) For any patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled; and
- (f) If a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party must identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim.

Critical to this requirement is the qualification that the disclosure is of information “of which the party is aware,” “as specific as possible,” and that many details are only required “if known.” This preliminary disclosure is not a claim chart. It is a starting point. Granted, the Gateway claim charts are very helpful, and may be an analogue, but *at this point* the Defendants are entitled to know *what is known* by Plaintiff about the Defendants’ allegedly infringing

³¹ Defendants’ Supporting Memorandum 131, at 7.

³² Exhibit X to Declaration of Parisa Jorjani in Support of Defendants’ Motion to Compel Interrogatory Responses, docket no. 132, filed July 21, 2006.

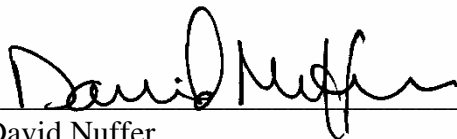
products. As discovery develops the entire field of allegedly infringing products, the claim charts will eventually be required to tell the entire story from Plaintiff's viewpoint.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion to Compel Complete Answers to Interrogatory No. 14, and for a Finding that Rule 33(d) Does Not Apply³³ is GRANTED IN PART. Dell and IBM shall provide the number of each product that they have identified in their tabular responses.

IT IS FURTHER ORDERED that Defendants' Motion to Compel Interrogatory Responses,³⁴ is GRANTED IN PART in that Plaintiff shall within twenty days serve an answer to each Defendant's interrogatories regarding its claims of infringement, with information now known by Adams.

Dated this 15th day of September, 2006.


David Nuffer
United States Magistrate Judge

³³ Docket no. 123, filed July 6, 2006.

³⁴ Docket no. 130, filed July 21, 2006.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

KATE MOLANO-YOUMAN,

Plaintiffs,

vs.

HARTFORD LIFE, et al.,

Defendants.

ORDER

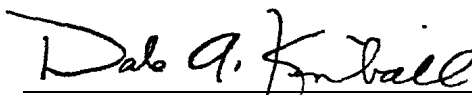
Case No. 1:05CV83DAK

On June 13, 2006, Defendant Hartford Life filed a motion for summary judgment seeking to have this action dismissed. Because Plaintiff failed to respond to the motion, Defendant filed a reply with the court on August 9, 2006, asking this court to grant summary judgment. As of the date of this order, Plaintiff has not opposed Defendant's motion for summary judgment.

Being fully informed and for good cause appearing, IT IS HEREBY ORDERED that Defendant Hartford Life's motion for summary judgment is GRANTED. The clerk of court is ordered to enter judgment in favor of Defendant. This case is closed, each party to bear her and its own costs.

DATED this 15th day of September, 2006.

BY THE COURT:



DALE A. KIMBALL

United States District Judge

United States District Court

NORTHERN DISTRICT OF UTAH

UNITED STATES OF AMERICA
V.

ORDER SETTING CONDITIONS OF RELEASE

Laura Johnson

Case Number: 1:06CR75TS

IT IS SO ORDERED that the release of the defendant is subject to the following conditions:

- (1) The defendant shall not commit any offense in violation of federal, state or local or tribal law while on release in this case.
- (2) The defendant shall immediately advise the court, defense counsel and the U.S. attorney in writing of any change in address and telephone number.
- (3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed

as directed. The defendant shall next appear at (if blank, to be notified)

US District Court

PLACE

350 South Main, SLC

on

as directed

DATE AND TIME

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

- (✓) (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed.
- () (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of

_____ dollars (\$) _____

in the event of a failure to appear as required or to surrender as directed for service of any sentence imposed.

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

SEP 15 2006

MARKUS B. ZIMMER, CLERK
BY _____
DEPUTY CLERK

Additional Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant and the safety of other persons and the community, it is FURTHER ORDERED that the release of the defendant is subject to the conditions marked below:

- () (6) The defendant is placed in the custody of:
(Name of person or organization)
(Address)
(City and state) (Tel.No.)

who agrees (a) to supervise the defendant in accordance with all the conditions of release, (b) to use every effort to assure the appearance of the defendant at all scheduled court proceedings, and (c) to notify the court immediately in the event the defendant violates any conditions of release or disappears.

Signed: _____
Custodian or Proxy

- () (7) The defendant shall:
- (✓)(a) maintain or actively seek employment (full time) within surrounding counties of residence
 - () (b) maintain or commence an educational program.
 - (✓)(c) abide by the following restrictions on his personal associations, place of abode, or travel:
Maintain current residence; may not move w/o PRIOR permission of PTS; Travel is restricted to Utah
 - (✓)(d) NO contact with the following named persons: husband in Mexico; potential witnesses
 - (✓)(e) report on a regular basis to the supervising officer as directed.
 - (✓)(f) comply with the following curfew: At home all times but 1 hour prior to employment shift and 1 hour after completion of employment shift. May leave home for court appearances and preparation of case
 - (✓)(g) refrain from possessing a firearm, destructive device, or other dangerous weapon.
 - () (h) refrain from excessive use of alcohol.
 - (✓)(i) refrain from any use or unlawful possession of a narcotic drug and other controlled substances defined in 21 U.S.C. §802 unless prescribed by a licensed medical practitioner.
 - () (j) undergo medical or psychiatric treatment and/or remain in an institution, as follows:
 - () (k) execute a bond or an agreement to forfeit upon failing to appear as required, the following sum of money or designated property
 - () (l) post with the court the following indicia of ownership of the above-described property, or the following amount or percentage of the above-described money:
 - (✓)(m) execute a cash bond in the amount of \$25,000.
 - () (n) return to custody each (week)day as of _____ o'clock after being released each (week)day as of _____ o'clock for employment, schooling or the following limited purpose(s):
 - () (o) surrender any passport to
 - (✓)(p) obtain no passport
 - (✓)(q) the defendant will submit to drug/alcohol testing as directed by the pretrial office. If testing reveals illegal drug use, the defendant shall participate in drug and/or alcohol abuse treatment, if deemed advisable by supervising officer.
 - () (r) participate in a program of inpatient or outpatient substance abuse therapy and counseling if deemed advisable by the supervising officer.
 - (✓)(s) submit to an electronic monitoring program as directed by the supervising officer.
 - (✓)(t) phone records are to be made available to PTS

Advice of Penalties and Sanctions

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

A violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of release, an order of detention, and a prosecution for contempt of court and could result in a term of imprisonment, a fine, or both.

The commission of a Federal offense while on pretrial release will result in an additional sentence of a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence.

Federal law makes it a crime punishable by up to 10 years of imprisonment, and a \$250,000 fine or both to obstruct a criminal investigation. It is a crime punishable by up to ten years of imprisonment and a \$250,000 fine or both to tamper with a witness, victim or informant; to retaliate or attempt to retaliate against a witness, victim or informant; or to intimidate or attempt to intimidate a witness, victim, juror, informant, or officer of the court. The penalties for tampering, retaliation, or intimidation are significantly more serious if they involve a killing or attempted killing.

If after release, you knowingly fail to appear as required by the conditions of release, or to surrender for the service of sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

- (1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, you shall be fined not more than \$250,000 or imprisoned for not more than 10 years, or both;
- (2) an offense punishable by imprisonment for a term of five years or more, but less than fifteen years, you shall be fined not more than \$250,000 or imprisoned for not more than five years, or both;
- (3) any other felony, you shall be fined not more than \$250,000 or imprisoned not more than two years, or both.
- (4) a misdemeanor, you shall be fined not more than \$100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be in additions to the sentence for any other offense. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgment of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release, to appear as directed, and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.

X Laura Johnson
Signature of Defendant

Address

City and State Telephone

Directions to the United States Marshal

- (X) The defendant is ORDERED released after processing.
() The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judicial officer that the defendant has posted bond and/or complied with all other conditions for release. The defendant shall be produced before the appropriate judicial officer at the time and place specified, if still in custody.

Date: 9/14/06

Brooke C. Wells
Signature of Judicial Officer

Magistrate Judge Brooke C. Wells

Name and Title of Judicial Officer

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
Northern Division for the District of Utah

Lifetime Products, Inc.,

Plaintiff,

vs.

Wok and Pan Ind and Banquet Inc,

Defendant.

**SCHEDULING ORDER AND
ORDER VACATING HEARING**

Case No. 1:06CV8DB

District Judge Dee Benson

Magistrate Judge

Pursuant to Fed. R. Civ. P. 16(b), the Magistrate Judge¹ received the Attorneys' Planning Report filed by counsel. The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

IT IS ORDERED that the Initial Pretrial Hearing set for 10/11/06, at 9:00 a.m. is **VACATED**.

****ALL TIMES 4:30 PM UNLESS INDICATED****

- | | | |
|-----------|---|----------------------|
| 1. | PRELIMINARY MATTERS | <u>DATE</u> |
| | Nature of claim(s) and any affirmative defenses: | |
| | a. Was Rule 26(f)(1) Conference held? | <u>Yes</u> |
| | b. Has Attorney Planning Meeting Form been submitted? | <u>Yes</u> |
| | c. Was 26(a)(1) initial disclosure completed? | <u>11/0/06</u> |
| 2. | DISCOVERY LIMITATIONS | <u>NUMBER</u> |
| | a. Maximum Number of Depositions by Plaintiff(s) | <u>10</u> |
| | b. Maximum Number of Depositions by Defendant(s) | <u>10</u> |
| | c. Maximum Number of Hours for Each Deposition
(unless extended by agreement of parties) | <u>7</u> |
| | d. Maximum Interrogatories by any Party to any Party | <u>25</u> |
| | e. Maximum requests for admissions by any Party to any Party | |

f. Maximum requests for production by any Party to any Party

DATE

3. AMENDMENT OF PLEADINGS/ADDING PARTIES²

a. Last Day to File Motion to Amend Pleadings 11/30/06

b. Last Day to File Motion to Add Parties 11/30/06

4. RULE 26(a)(2) REPORTS FROM EXPERTS³

a. Plaintiff 9/7/07

b. Defendant 9/7/07

c. Counter Reports 10/5/07

5. OTHER DEADLINES

a. Discovery to be completed by:

Fact discovery 7/20/07

Expert discovery 11/9/07

b. *(optional)* Final date for supplementation of disclosures and discovery under Rule 26 (e)

c. Deadline for filing dispositive or potentially dispositive motions 12/14/07

6. SETTLEMENT/ ALTERNATIVE DISPUTE RESOLUTION

a. Referral to Court-Annexed Mediation

b. Referral to Court-Annexed Arbitration

c. Evaluate case for Settlement/ADR on

d. Settlement probability:

7. TRIAL AND PREPARATION FOR TRIAL:

a. Rule 26(a)(3) Pretrial Disclosures⁴

Plaintiffs 3/17/08

Defendants 3/31/08

b. Objections to Rule 26(a)(3) Disclosures
(if different than 14 days provided in Rule)

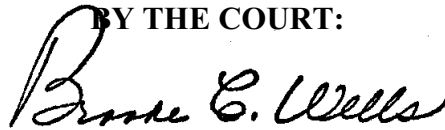
			<u>DATE</u>
c.	Special Attorney Conference ⁵ on or before		4/14/08
d.	Settlement Conference ⁶ on or before		
e.	Final Pretrial Conference	2:30 pm	4/29/08
f.	Trial	<u>Length</u>	<u>Time</u> <u>Date</u>
	i. Bench Trial		
	ii. Jury Trial	<u>5</u>	<u>8:30 am</u> <u>5/12/08</u>

8. OTHER MATTERS:

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

Dated this 15 day of September, 2006.

BY THE COURT:



**Brooke C. Wells
U.S. Magistrate Judge**

1. The Magistrate Judge completed Initial Pretrial Scheduling under DUCivR 16-1(b) and DUCivR 72-2(a)(5). The name of the Magistrate Judge who completed this order should NOT appear on the caption of future pleadings, unless the case is separately referred to that Magistrate Judge. A separate order may refer this case to a Magistrate Judge under DUCivR 72-2 (b) and 28 USC 636 (b)(1)(A) or DUCivR 72-2 (c) and 28 USC 636 (b)(1)(B). The name of any Magistrate Judge to whom the matter is referred under DUCivR 72-2 (b) or (c) should appear on the caption as required under DUCivR10-1(a).
2. Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).
3. A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.
4. Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.
5. The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special

equipment or courtroom arrangement requirements will be included in the pre-trial order.

6. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

S:\IPT\2006\Lifetime Prod vs Wok and Pan 1 06 cv 80 DB alp.wpd

MEMORANDUM

FILED IN UNITED STATES DISTRICT
COURT DISTRICT OF UTAH

SEP 13 2006

TO: Markus Zimmer
Clerk of the Court

MARKUS B. ZIMMER, CLERK
BY _____
DEPUTY CLERK

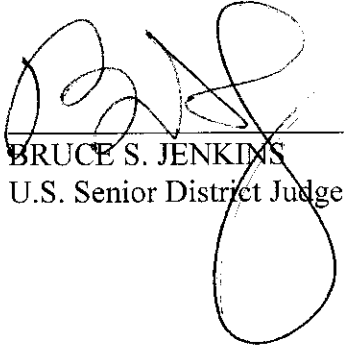
FROM: Bruce S. Jenkins
U.S. Senior District Judge

DATE: September 12, 2006

SUBJECT: Conley v. Ogden Police Dept., et al.
Case No. 1:06-CV-104

I find I must recuse myself from this case.

Would you please see that this case is reassigned to another judge pursuant to our computer program.



BRUCE S. JENKINS
U.S. Senior District Judge

Judge Ted Stewart
DECK TYPE: Civil
DATE STAMP: 09/14/2006 @ 14:20:33
CASE NUMBER: 1:06CV00104 TS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, : A-00-288M

 Plaintiff, :

 vs. : ORDER GRANTING LEAVE OF
 : COURT TO FILE A DISMISSAL
ISRAEL ALVARADO-ORTIZ, : OF THE COMPLAINT

 Defendant.

Based upon the motion of the United States of America, the Court hereby grants leave pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure to allow the United States Attorney to file a dismissal of the complaint in the above-referenced matter.

IT IS SO ORDERED.

DATED this 29th day of August, 2006.

BY THE COURT:



SAMUEL ALBA
United States Magistrate Judge

BRETT L. TOLMAN, United States Attorney (#8821)
JEANNETTE F. SWENT, Assistant United States Attorney (#60435)
Attorneys for the United States of America
185 South State Street, Suite 400
Salt Lake City, Utah 84111-1506
Telephone (801) 524-5682

FILED
U.S. DISTRICT COURT

2001 SEP 15 A 9:56

DISTRICT OF UTAH

BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,	)	O R D E R
)	
vs.)	
)	
RICK S. ROBISON,	)	Case No. 2:01CR00494-001S
)	
Defendant,	)	Honorable Ted Stewart

The Court, having received the Stipulation of the parties
dated August 20, 2006, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Judgment was entered on November 27, 2001 in the
total sum of \$28,198.06 in favor of the United States of America
(hereafter the "United States") and against Rick S. Robison
(hereafter "Robison").

2. Robison has agreed to pay and the United States has agreed to accept monthly installment payments from him in the amount of \$200.00 commencing on September 1, 2006 and continuing thereafter on the 1st day of each month for a period of 12 months. At the end of said time period, and yearly thereafter, Robison shall submit a current financial statement to the United States Attorney's Office. This payment schedule will be evaluated and may be modified, based on the documented financial status of Robison.

3. In addition to the regular monthly payment set forth in paragraph 2, above, Robison has agreed that the United States may submit his debt in the above-captioned case to the State of Utah and the U.S. Department of Treasury for inclusion in the State Finder program and the Treasury Offset program. Robison understands that under these programs, any state or federal payment that he would normally receive may be offset and applied toward the debt in the above-captioned case.

4. Robison shall submit all financial documentation in a timely manner and keep the United States Attorney's Office apprised of the following:

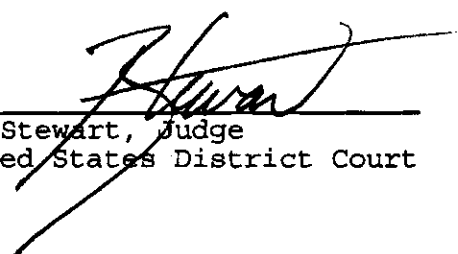
- a. Any change of address; and
- b. Any change in employment.

5. The United States has agreed to refrain from execution on the judgment so long as Robison complies strictly with the agreement set forth in paragraphs 2 and 4, above. In the event Robison fails to comply strictly with the terms set forth in the

Stipulation dated August 20, 2006, the United States may move the Court ex parte for a writ of execution and/or a writ of garnishment or any other appropriate order it deems necessary for the purpose of obtaining satisfaction of the judgment in full.


DATED this 14th day of September, 2006.

BY THE COURT:



Ted Stewart, Judge
United States District Court

APPROVED AS TO FORM:



RICK S. ROBISON
Defendant

United States District Court
for the District of Utah

Request and Order for Sealed Document

Name of Offender: **Troy Anthony Brinar**

Docket Number: **2:02-CR-00283-001-PGC**

Name of Sentencing Judicial Officer: **Honorable Paul G. Cassell**
United States District Judge

FILED
U.S. DISTRICT COURT
2006 SEP 15 P 4: 34
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

Date of Original Sentence: **October 24, 2002**

Original Offense: **Felon in Possession of a Firearm**

Original Sentence: **30 months BOP/36 months Supervised Release**

Type of Supervision: **Supervised Release** Supervision Began: **May 19, 2006**


PETITIONING THE COURT

☒ To order that Document 57 filed with the Clerk of the Court by the U. S. Probation Office on May 2, 2006, be placed under seal.

CAUSE

Placing Document 57 under seal is in the best interest of the defendant. Greg Diamond, Assistant U.S. Attorney, and Lynn Clark Donaldson, Assistant Federal Defender, have been informed of this petition and they both agreed that this would be an appropriate action.

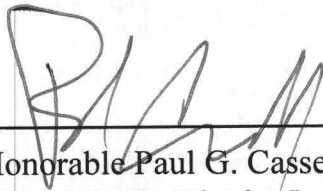
I declare under penalty of perjury that the foregoing is true and correct



Karan D. Pace, Deputy Chief
U.S. Probation Officer
Date: September 15, 2006

THE COURT ORDERS:

- ☒ That Document 57 filed on May 2, 2006 be placed under seal.
- ☐ No action
- ☐ Other



Honorable Paul G. Cassell
United States District Judge

Date: 9/15/06

United States District Court District of Utah

FILED
U.S. DISTRICT COURT

2006 SEP 15 A 10:06

UNITED STATES OF AMERICA

vs.

Ronald L. Olague

(For Revocation of Probation or Supervised Release)
(For Offenses Committed On or After November 1, 1987)

Case Number: 2:02-cr-00752-001 DB

Plaintiff Attorney: Mark Hirata

Defendant Attorney: L. Clark Donaldson

Atty: CJA ___ Ret ___ FPD *

Defendant's Soc. Sec. No.: 569-06-7310

Defendant's Date of Birth: 10/29/1967

09/13/2006

Date of Imposition of Sentence

Defendant's USM No.: 10188-081

Defendant's Residence Address:

410 West Center Street

Defendant's Mailing Address:

SAME

Springville, Utah 84663

SAME

Country

Country

THE DEFENDANT:

☒ admitted to allegation(s) I and II☐ pleaded nolo contendere to allegation(s) _____
which was accepted by the court.☐ was found guilty as to allegation(s) _____

COP 07/02/2003 Verdict _____

Violation Number**Nature of Violation****Date Violation
Occurred**

I

The defendant has absconded supervision.

N/A

III

The defendant committed the Second Degree Felony
of Illegal Possession of a Controlled Substance

11/19/2005

☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.**SENTENCE**

Pursuant to the Sentencing Reform Act of 1984, it is the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prisons for a term of

3 months.Upon release from confinement, the defendant shall be placed on supervised release for a term of
1 year.☐ The defendant is placed on Probation for a period of _____
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant possesses a low risk of future substance abuse. (Check if applicable.)

SPECIAL CONDITIONS OF SUPERVISED RELEASE/PROBATION

In addition to all Standard Conditions of (Supervised Release or Probation) set forth in PROBATION FORM 7A, the following Special Conditions are imposed: (see attachment if necessary)

The defendant shall remain at the Cornell Correctional Center under public law for 3 months. The defendant shall be released for work, religious, educational, medical reasons as deemed appropriate by the probation office.

ALL OTHER CONDITIONS ARE REINSTATED.

1. The defendant will submit to drug/alcohol testing as directed by the probation office and pay a one-time \$115.00 fee to partially defer the costs of collection and testing. If testing reveals illegal drug use, the defendant shall participate in drug and/or alcohol abuse treatment under a co-payment plan as directed by the United States Probation Office.
2. The defendant shall submit his person, residence, office, or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
3. The defendant shall not consume alcohol.
4. The defendant shall participate in mental health treatment.
5. The defendant shall take medications as prescribed.
6. The defendant shall participate in a drug re-hab program under the direction of the United States Probation Office.

CRIMINAL MONETARY PENALTIES

FINE

The defendant shall pay a fine in the amount of \$ _____, payable as follows:

☐ forthwith.

☐ in accordance with the Bureau of Prison's Financial Responsibility Program while incarcerated and thereafter pursuant to a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.

☐ in accordance with a schedule established by the U.S. Probation office, based upon the _____

defendant's ability to pay and with the approval of the court.

☒ other:
No Fine Imposed

☐ The defendant shall pay interest on any fine more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f).

☐ The court determines that the defendant does not have the ability to pay interest and pursuant to 18 U.S.C. § 3612(f)(3), **it is ordered that:**

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

The defendant shall make restitution to the following payees in the amounts listed below:

<u>Name and Address of Payee</u>	<u>Amount of Loss</u>	<u>Amount of Restitution Ordered</u>
----------------------------------	-----------------------	--------------------------------------

Totals: \$ _____ \$ _____

(See attachment if necessary.) All restitution payments must be made through the Clerk of Court, unless directed otherwise. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless otherwise specified.

☐ Restitution is payable as follows:

☐ in accordance with a schedule established by the U.S. Probation Office, based upon the defendant's ability to pay and with the approval of the court.

☐ other:

☐ The defendant having been convicted of an offense described in 18 U.S.C. § 3663A(c) and committed on or after 04/25/1996, determination of mandatory restitution is continued until _____ pursuant to 18 U.S.C. § 3664(d)(5) (not to exceed 90 days after sentencing).

☐ An Amended Judgment in a Criminal Case will be entered after such determination

SPECIAL ASSESSMENT

The defendant shall pay a special assessment in the amount of \$ _____, payable as follows:

☐ forthwith.

☐ _____

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

PRESENTENCE REPORT/OBJECTIONS

The court adopts the factual findings and guidelines application recommended in the presentence report except as otherwise stated in open court.

RECOMMENDATION


- ☐ Pursuant to 18 U.S.C. § 3621(b)(4), the Court makes the following recommendations to the Bureau of Prisons:

CUSTODY/SURRENDER

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district at _____ on _____.
- ☐ The defendant shall report to the institution designated by the Bureau of Prisons by _____ Institution's local time, on _____.

DATE:

9-14-2006


Dee Benson
United States District Judge

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

CHERI K. GOCHBERG, #8186
KENT W. HANSEN, #6560
280 South 400 West, #250
Salt Lake City, UT 84101
Telephone: (801) 212-3985
Facsimile: (801) 212-3978

Attorneys for Union Pacific Railroad Company

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNION PACIFIC RAILROAD COMPANY,
a Delaware corporation,

Plaintiff,

vs.

SCHAEFFER INDUSTRIES,

Defendant.

AMENDED SCHEDULING ORDER

Case No. 2:03CV-0263 DAK

Based upon the Court's Order dated August 21, 2006, and the Stipulation to Amend Scheduling Order of the parties, IT IS HEREBY ORDERED that the discovery and dispositive motion deadlines are as follows:

I. PLEADINGS/MOTIONS:

b. Cutoff for Dispositive Motions January 31, 2007

II. DISCLOSURES:

e. Rule 26(a)(2)(B) final Reports from Retained Experts February 28, 2007

Rebuttal Reports April 15, 2007

f. Rule 26(a)(3) Pretrial Disclosures

Plaintiff

June 30, 2007

Defendant

July 15, 2007

III. DISCOVERY CUTOFF

a. Fact witnesses

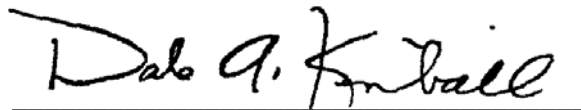
January 31, 2007

b. Expert Witnesses

April 30, 2007

MADE AND ENTERED this 15th day of September 2006.

BY THE COURT:

A handwritten signature in black ink, reading "Dale A. Kimball", written over a horizontal line.

Dale A. Kimball
U.S. District Court Judge

Brent O. Hatch (5715)
Mark F. James (5295)
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666

Robert Silver (admitted pro hac vice)
Edward Normand (admitted pro hac vice)
BOIES, SHCILLER & FLEXNER LLP
333 Main Street
Armoonk, New York 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

Stuart H. Singer (admitted pro hac vice)
BOIES, SHCILLER & FLEXNER LLP
401 East Las Olas Boulevard—Suite 1200
Ft. Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

Stephen N. Zack (admitted pro hac vice)
BOIES, SHCILLER & FLEXNER LLP
Bank of America Tower—Suite 2800
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 539-8400
Facsimile: (305) 539-1307

Attorneys for The SCO Group, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC.

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

ORDER GRANTING MOTION TO
WITHDRAW SCOTT GANT AS
COUNSEL

Case No. 2:03CV0294 DAK

Honorable Dale A. Kimball

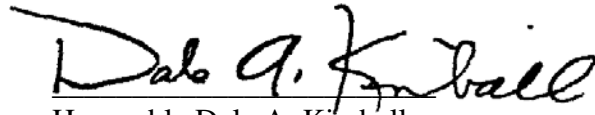
Magistrate Judge Brooke C. Wells

Based on the Motion to Withdraw Scott Gant as Counsel filed by Plaintiff The SCO Group, Inc. the Court hereby orders as follows:

Scott Gant is hereby terminated as counsel for The SCO Group in the above-entitled action.

DATED this 15th day of September, 2006.

BY THE COURT:

A handwritten signature in black ink, reading "Dale A. Kimball". The signature is written in a cursive, flowing style. The first name "Dale" is prominent, followed by "A." and then "Kimball".

Honorable Dale A. Kimball
U.S. District Court Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DEER CREST ASSOCIATES I, L.C., a Utah
Limited Liability Company,

Plaintiff,

vs.

DEER CREST RESORT GROUP, L.L.C., a
Delaware Limited Liability Company, et al.,

Defendants.

MEMORANDUM DECISION AND
ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION IN LIMINE

Case No. 2:04-CV-220 TS

This matter is before the Court on Plaintiff's Motion in Limine,¹ filed September 11, 2006. Defendants filed their response on September 14, 2006.² The Court finds that a hearing is not necessary for the resolution of this matter. Having considered the pleadings, the file and the history and prior rulings in this case, the Court will grant, in part, and deny, in part, Plaintiff's Motion, as set forth more fully below.

¹ Docket No. 113.

² Docket No. 117.

Pursuant to Fed. R. Evid. 103, 104(a), 402, and 403, Plaintiff seeks the exclusion at trial of evidence, including witnesses and/or exhibits regarding the following: 1) whether Defendants are entitled to an offset from recoverable damages for any amounts expended by Defendants on the Deer Crest Project; and 2) whether Defendants retain any interest in the Deer Crest Project, or the property, materials, or land use entitlements for the Deer Crest Project.

Based on the Court's prior rulings in this case, Defendants concede that evidence may not be offered relating to the second category. Therefore, the Court will exclude evidence, including witnesses and/or exhibits, regarding whether Defendants retain any interest in the Deer Crest Project, or the property, materials or land use entitlements for the Deer Crest Project, as those issues are precluded as a matter of law.

As noted in its previous ruling, the Court will allow Defendants the opportunity to assert their claim of a breach of the covenant of good faith and fair dealing. To the extent such a claim includes evidence as to whether Defendants are entitled to an offset from recoverable damages for any amounts expended by Defendants on the Deer Crest Project, Defendants will be allowed to make their case. Whether Defendants will be awarded any offset is another matter.


Based upon the above, it is hereby

ORDERED that Plaintiff's Motion in Limine (Docket No. 113) is granted, in part, and denied, in part. No evidence will be allowed at trial regarding whether Defendants retain any interest in the Deer Crest Project, or the property, materials or land use entitlements for the Deer Crest Project. However, the Court will allow evidence regarding whether Defendants are entitled to an offset from recoverable damages for any amounts expended by Defendants on the Deer Crest Project,

to the extent such evidence may support its cross-claim for breach of the covenant of good faith and fair dealing.

DATED this 15th day of September, 2006.

BY THE COURT:



TED STEWART
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SEP 15 P 3:55

U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

\$TWO THOUSAND EIGHT HUNDRED
EIGHTY DOLLARS (\$2,880) IN UNITED
STATES CURRENCY, et al.,

Defendants.

CASE: 2:04CV00888-BSJ

ENTRY OF DEFAULT

JUDGE: BRUCE S. JENKINS

It appearing from plaintiff's Application for Default and the records and files in this matter that no person or entity, including Mark Wayne Cruz and Gary William Fowler has filed a claim, answer, or other responsive pleading as provided in the Federal Rules of Civil Procedure, 18 U.S.C. § 983, and Supplemental Rules for Certain Admiralty and Maritime Claims as to the defendant properties:

- 1998 Audi A6 Quattro, VIN: WAUBA24B1WN081077
- \$3,227.00 in United States Currency

DEFAULT IS HEREBY ENTERED against all persons and entities including Mark Wayne Cruz and Gary William Fowler.

Dated this 15th day of September, 2006.

MARKUS B. ZIMMER
Clerk of the Court

By: 
DEPUTY CLERK

HEINZ J. MAHLER – 3832
KIPP AND CHRISTIAN, P.C.
Attorney for Defendant
10 Exchange Place, 4th Floor
Salt Lake City, Utah 84111
Telephone: (801) 521-3773

FILED
DISTRICT COURT
2006 SEP 15 PM 2:15
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SEP 15 2006
OFFICE OF U.S. DISTRICT JUDGE
BRUCE S. JENKINS

UNITED STATES DISTRICT COURT
STATE OF UTAH, CENTRAL DIVISION

RONALD KELLEY and ARDIS KELLEY,

Plaintiffs,

vs.

W & K EXPRESS, INC. and ALEXANDRE
NOVIKOV,

Defendants.

Case No. 2:04-CV-930BJ

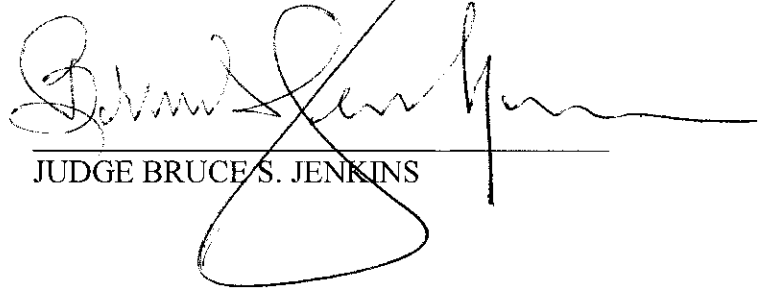
**ORDER OF DISMISSAL
WITH PREJUDICE**

Pursuant to Stipulation of the parties and the Court being fully advised in the premises it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. That the Complaint of plaintiffs Ronald Kelley and Ardis Kelley as against defendants W & K Express, Inc. and Alexandre Novikov shall be and is hereby dismissed with prejudice and upon the merits.
2. That each party is to bear their own costs and expenses.

DATED this 15 day of Sept, 2006.

BY THE COURT:



A handwritten signature in cursive script, appearing to read "Bruce S. Jenkins", is written over a horizontal line. Below the line, the name "JUDGE BRUCE S. JENKINS" is printed in a serif font.

JUDGE BRUCE S. JENKINS

APPROVED AS TO FORM:

HOWARD, LEWIS & PETERSEN, P.C.

/S/ Kenneth Parkinson
KENNETH PARKINSON
SEAN M. PETERSEN
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served, as indicated below, this _____ day of _____, 2006, a true and correct copy of the foregoing **Order of Dismissal with Prejudice**, to the following:

Via Electronic Filing with U.S. District Court

Kenneth Parkinson
Sean M. Petersen
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 1248
Provo, Utah 84603

Laura S. Evans
Secretary to Heinz J. Mahler

UNITED STATES DISTRICT COURT

CENTRAL DIVISION

District of

UTAH

UNITED STATES OF AMERICA

V.

OSCAR DANIEL ROSAS-ARMAS

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX 205CR000028-010

USM Number: 12348-081

Richard Mauro

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 18 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1)	Possession of Heroin with Intent to Distribute		18

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 2, 3 and 19 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/7/2006

Date of Imposition of Judgment

Signature of Judge

Ted Stewart

Name of Judge

U.S. District Judge

Title of Judge

9/8/2006

Date

DEFENDANT: OSCAR DANIEL ROSAS-ARMAS
CASE NUMBER: DUTX 205CR000028-010

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

48 months

☒ The court makes the following recommendations to the Bureau of Prisons:

Incarceration in Taft, CA to facilitate family visitation.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: OSCAR DANIEL ROSAS-ARMAS

CASE NUMBER: DUTX 205CR000028-010

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: OSCAR DANIEL ROSAS-ARMAS
CASE NUMBER: DUTX 205CR000028-~~010~~

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall not re-enter the United States illegally. In the event that the defendant should be released from confinement without being deported, he shall contact the United States Probation Office in the district of release within 72 hours of release. If the defendant returns to the United States during the period of supervision after being deported, he is instructed to contact the United States Probation Office in the District of Utah within 72 hours of arrival in the United States.

CASE NUMBER: DUTX 205CR000028-010

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: OSCAR DANIEL ROSAS-ARMAS

CASE NUMBER: DUTX 205CR000028-010

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

Central

District of

Utah

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

Rob Ellertson

Case Number: DUTX 2:05CR000067-001

USM Number: 06785-081

Larry N. Long

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 2 Felony Information

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18USC§1343	Wire Fraud		1 and 2

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/13/2006

Date of Imposition of Judgment

Signature of Judge

Dee Benson

Name of Judge

U.S. District Judge

Title of Judge

9/14/2006

Date

DEFENDANT: Rob Ellertson
CASE NUMBER: DUTX 2:05CR000067-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

33 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends a Federal Correctional Institution as close to Utah as possible, for family visitations.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 10/4/2006.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Rob Ellertson

CASE NUMBER: DUTX 2:05CR000067-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

60 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Rob Ellertson

CASE NUMBER: DUTX 2:05CR000067-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall maintain full-time verifiable employment or participate in academic or vocational development throughout the term of supervision as deemed appropriate by the probation office.
2. The defendant shall refrain from incurring new credit charges or opening additional lines of credit, unless he is in compliance with any established payment schedule and obtains the approval of the probation office.
3. The defendant shall provide the probation office access to all requested financial information.
4. The defendant shall abide by the following occupational restrictions: The defendant shall not have direct or indirect control over the assets or funds of others; the defendant shall not be involved in the probation, sale or solicitation of stocks or investment instruments and the defendant shall not be self employed.

DEFENDANT: Rob Ellertson
CASE NUMBER: DUTX 2:05CR000067-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$	\$ 2,759,573.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

SEE ATTACHED SHEET

TOTALS	\$ 0.00	\$ 0.00
--------	---------	---------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Rob Ellertson
CASE NUMBER: DUTX 2:05CR000067-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 200.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Restitution is due in the amount of \$2,759,573.00 joint and several with Corey Nance Dkt 2:04-cr-000291-001 DB.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 15

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

Central

District of

Utah

UNITED STATES OF AMERICA

V.

Camille Julkunen

JUDGMENT IN A CRIMINAL CASE

(For Revocation of Probation or Supervised Release)

Case Number: DUTX205CR000101-002

USM Number: 12560-081

Chelsea Koch

Defendant's Attorney

THE DEFENDANT:

☒ admitted guilt to violation of condition(s) 1 through 3 of the term of supervision.

☐ was found in violation of condition(s) _____ after denial of guilt.

The defendant is adjudicated guilty of these violations:

Violation Number	Nature of Violation	Violation Ended
1	Submitted a urine specimen which tested positive for methamphetamine, & later admitted using methamphetamine	5/4/2006
2	Failed to participate in substance abuse treatment as ordered	
3	Admitted using methamphetamine on 8/3 and 8/10/2006	8/14/2006

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has not violated condition(s) _____ and is discharged as to such violation(s) condition.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Defendant's Soc. Sec. No.: _____

Defendant's Date of Birth: _____

Defendant's Residence Address: _____

9/14/2006

Date of Imposition of Judgment

Signature of Judge

Dale A. Kimball

Name of Judge

U.S. District Judge

Title of Judge

Date

Defendant's Mailing Address: _____

DEFENDANT: Camille Julkunen
CASE NUMBER: DUTX205CR000101-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of :
9 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court strongly recommends that the defendant be incarcerated in FCI Dublin, CA or Phoenix, AZ to allow her to have the benefit of the Mothers and Infants Together Program and to facilitate family visitation.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Camille Julkunen

CASE NUMBER: DUTX205CR000101-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
12 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Camille Julkunen
CASE NUMBER: DUTX205CR000101-002

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall refrain from incurring new credit charges or opening additional lines of credit unless she is in compliance with any established payment schedule and obtains the approval of the U. S. Probation Office.
2. The defendant shall provide the U. S. Probation Office access to all requested financial information.
3. The defendant shall abide by the following occupational restrictions:
The defendant is prohibited from participating in any manner in the affairs of any federally regulated financial institution.
The defendant shall not have direct or indirect control over the assets or funds of others.
4. The defendant shall submit to drug/alcohol testing as directed by the U. S. Probation Office and pay a one-time \$115 fee to partially defray the costs of collection and testing.
5. The defendant shall participate in drug and/or alcohol abuse treatment under a co-payment plan as directed by the U. S. Probation Office and shall not possess or consume alcohol during the course of treatment, nor frequent businesses where alcohol is the chief item of order.
6. The defendant shall participate in a mental health treatment program under a co-payment plan, as directed by the U. S. Probation Office, take any mental health medications as prescribed, and not possess or consume alcohol, or frequent businesses where alcohol is the chief item of order during the course of treatment or medication.
7. The defendant shall submit her person, residence, office, or vehicle to a search, conducted by the U. S. Probation Office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches, pursuant to this condition.
8. The Court waives the payment of the delinquent electronic monitoring fee balance.

UNITED STATES DISTRICT COURT

Central

District of

Utah

UNITED STATES OF AMERICA

V.

MARY ELIZABETH JORGENSON

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX205CR000535-004

USM Number: 12920-081

Bel-Ami de Montreux

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 5s of the Superseding Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. 841 (c)	Possession of a List II Chemical- Iodine		5s

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/13/2006

Date of Imposition of Judgment

Signature of Judge

Paul Cassell

Name of Judge

US District Judge

Title of Judge

Date

9/14/06

DEFENDANT: MARY ELIZABETH JORGENSON
CASE NUMBER: DUTX205CR000535-004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

52 months

☒ The court makes the following recommendations to the Bureau of Prisons:

Placement in the Dublin, Ca. facility for the work program that are available and a drug treatment program

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 10/20/2006

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MARY ELIZABETH JORGENSON

CASE NUMBER: DUTX205CR000535-00-4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MARY ELIZABETH JORGENSEN

CASE NUMBER: DUTX205CR000535-004

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant will submit to drug testing as directed by the probation office, and pay a one-time \$115 fee to partially defer the costs of collection and testing.
2. The defendant shall participate in drug abuse treatment under a copayment plan as directed by the United States Probation Office and shall not possess or consume alcohol during the course of treatment, nor frequent business where alcohol is the chief item of order.
3. The defendant shall participate in a mental health treatment program under a copayment plan as directed by the probation office, take any mental health medications as prescribed, and not possess or consume alcohol, nor frequent businesses where alcohol is the chief item of order, during the course of treatment or medication.
4. The defendant shall submit her person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: MARY ELIZABETH JORGENSON

CASE NUMBER: DUTX205CR000535-00 4

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

TOTALS	\$ _____ 0.00	\$ _____ 0.00	
--------	---------------	---------------	--

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MARY ELIZABETH JORGENSON
CASE NUMBER: DUTX205CR000535-004

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

Loren E. Weiss (3969)
Jessica Stengel (8915)
VAN COTT BAGLEY CORNWALL & MCCARTHY
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Attorneys for Defendant

FILED
U.S. DISTRICT COURT
2006 SEP 15 A 9:56
DISTRICT OF UTAH
BY: DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

UNITED STATES OF
AMERICA,

Plaintiff,

vs.

GILMAN N. MITCHELL,

Defendant

ORDER

Case No. 2:05 CR 566 TS

Honorable Ted Stewart
Magistrate Judge Brooke C. Wells

Defendant Gilman N. Mitchell and Plaintiff United States of America
submitted a Stipulated Motion to Continue Trial on September 14, 2006,
requesting the trial scheduled for September 25, 2006, be reset for January 22,
2007.

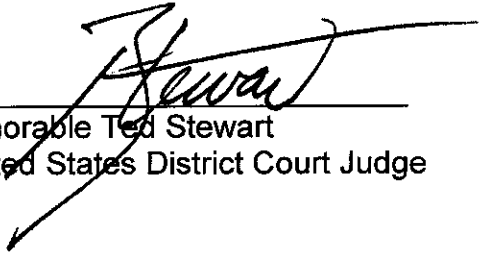
IT IS HEREBY ORDERED

In accordance with the provisions of 18 U.S.C. § 3161(h)(1)(F), the period of delay from this continuance shall be excluded in computing the time within which trial in this matter must commence under the Speedy Trial Act; and also the trial date of September 25, 2006, shall be continued until January 22, 2007.

The Court also finds, in accordance with the provisions of 18 U.S.C. § 3161(h)(8)(A), that the ends of justice, public interest, and the Defendants' interests are served by the delay, and that this delay outweighs the best interest public and the Defendants in a speedy trial.

DATED this 14th day of September, 2006.

BY THE COURT:



Honorable Ted Stewart
United States District Court Judge

FILED
U.S. DISTRICT COURT

2006 SEP 14 P 4: 27 IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

2:04CR00472 ~~re~~ BAK

Plaintiff,

vs.

ORDER CONTINUING HEARING

JEREMIAH WEST,

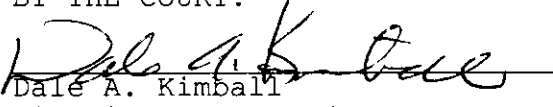
JUDGE DALE A. KIMBALL

Defendant.

Based upon the motion of the United States, the Court hereby
ORDERS that the hearing on the defendant's motion to withdraw
guilty plea be continued until the 26th day of
September, 2006, at 2:00 p.m.

DATED this 14th of September, 2006.

BY THE COURT:


Dale A. Kimball
District Court Judge

UNITED STATES DISTRICT COURT

Central

District of

Utah

UNITED STATES OF AMERICA

V.

ALMA RUIZ

JUDGMENT IN A CRIMINAL CASE

FILED
U.S. DISTRICT COURT

2006 SEP 14 P 5:26

CLERK OF COURT

Case Number: DUTX205CR000887-009

USM Number: 13141-081

Stephen McCaughey

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 2 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC §§1956(a)(2)(A) and (B)	Conspiracy to Commit Money Laundering		2

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 4 ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/12/2006

Date of Imposition of Judgment

Signature of Judge

Dale A. Kimball

Name of Judge

US District Judge

Title of Judge

Date

September 14, 2006

DEFENDANT: ALMA RUIZ
CASE NUMBER: DUTX205CR000887-009

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

12 months plus 1 day

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant be housed locally as she will be will be testifying at a trial in February, 2007.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ALMA RUIZ

CASE NUMBER: DUTX205CR000887-009

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ALMA RUIZ

CASE NUMBER: DUTX205CR000887-009

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not illegally reenter the United States. If the defendant returns to the United States during the period of supervision, she is instructed to contact the United States Probation Office in the District of Utah within 72 hours of arrival in the United States.

DEFENDANT: ALMA RUIZ

CASE NUMBER: DUTX205CR000887-009

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>
--------	----------------	----------------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ALMA RUIZ
CASE NUMBER: DUTX205CR000887-009

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

FILED
U.S. DISTRICT COURT

2006 SEP 14 P 3:24

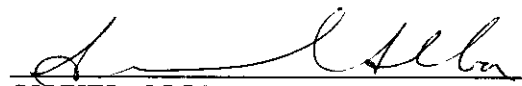
STACY NELSON-WAGGONER,)	
)	
Petitioner,	)	Case No. 2:05-CV-248 DAK
)	
v.	)	District Judge Dale Kimball
)	
JERRY JORGENSEN,	)	O R D E R
)	
Respondent.	)	Magistrate Judge Samuel Alba

Petitioner, Stacy Nelson-Waggoner, a state prisoner, has filed a *habeas corpus* petition. See 28 U.S.C.S. § 2254 (2006). The Court originally ordered the Utah Attorney General to respond to his petition by May 26, 2006.

IT IS HEREBY ORDERED that this deadline is extended. On or before October 26, 2006, the Utah Attorney General must respond to the petition. IT IS FURTHER ORDERED that the Clerk of Court is directed to send a copy of this Order, along with a copy of the petition, to the Utah Attorney General.

DATED this 13th day of September, 2006.

BY THE COURT:


SAMUEL ALBA
U. S. Chief Magistrate Judge

Stacey Nelson-Waggoner
U.S.P. No. 27664
Central Utah Correctional Facility
P.O. Box 550
Gunnison, Utah 84634
Pro Se Petitioner

FILED REC'D
U.S. DISTRICT COURT
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

STACY NELSON-WAGGONER,

Petitioner,

vs.

JERRY JORGENSEN, Warden, Central
Utah Correctional Facility,

Respondent.

PETITION FOR WRIT OF
HABEAS CORPUS

Judge Dale A. Kimball
DECK TYPE: Civil
DATE STAMP: 05/09/2005 @ 14:18:32
CASE NUMBER: 2:05CV00248 DAK

Petitioner, Stacy Nelson-Waggoner, hereby submits the following Petition for
Writ of Habeas Corpus.

INTRODUCTION

1. Petitioner is a state inmate currently being held at the Central Utah Correctional Facility, Gunnison, Utah.
2. Respondent is the warden at the Central Utah Correctional Facility.
3. Petitioner is being held in violation of the United States Constitution and laws of the United States.
4. Petitioner has exhausted all remedies available in the Utah State Courts.

STATEMENT OF THE CASE

A. Trail Court Proceedings and Disposition

Stacey Nelson-Waggoner was charged by information filed in First District Court on or about September 29, 1997, with aggravated sexual assault, a first degree felony, in violation of Utah Code Annotated § 76-5-405 (R.1). The information stated the alleged offense occurred against K.W. on or about “November 17, 1996 to November 30, 1996” (R.2).

On October 15, 1997, a preliminary hearing was held before Judge Clint S. Judkins at which time Nelson-Waggoner was bound over for trial on the charge upon a finding of probable cause (R. 48-49). At the preliminary hearing K.W. testified unequivocally that the date of the offense was November 24, 1996 (10/15/97 Tr. At 8-14, 16).

Shannon Demler was originally appointed to represent Nelson-Waggoner as conflict counsel for the Cache County Public Defender. On November 6, 1997, Delmer filed a motion to withdraw as counsel and recommended that the case be assigned to Ken Brown (R. 54-59). On November 17, 1997, a hearing was held and it was decided that Brown would join Demler as co-counsel and Barbara Lochmar, who had previously been appointed as co-counsel, was released (R. 61-62).

On September 2, 1999, Nelson-Waggoner filed a Motion for a Bill of Particulars requesting that the State specify with particularity that “place, date, and time of the commission of the offense against [K.W.]” (R. 196).

On October 1, 1999, Nelson-Waggoner filed a Motion to Require Specification of Date and Time of Offense, And/Or Waive Notice of Alibi Requirement (R. 467). Nelson-Waggoner argued that the notice provided the state (the alleged offense occurred on or about November 17, 1996 to November 30, 1996) was constitutionally inadequate to permit him to prepare his defense and that there was information available to the State to enable them in “pinning down the date and time of the alleged offense” (R. 471). Alternatively, Nelson-Waggoner asserted that without further specification he should be

granted “concomitant leeway” in identifying witnesses he may call to support his alibi defense (R. 469-71).

On October 8, 1999, Nelson-Waggoner filed a Notice of Alibi (R. 523). The notice informed the prosecution of Nelson-Waggoner’s intent to call witnesses to provide evidence that he was in the Cache Country area on November 17, 1996, but he was not with the alleged victim and that on November 24, 1996, he was in Phoenix Arizona and thus not with the alleged victim (R. 523-4).

On October 12, 1999, a hearing was held before Judge Low where John Caine is appointed as counsel for Nelson-Waggoner (R. 212-13). In addition, Judge Low granted defendant’s motion for change of venue (Id.).

On November 12, 1999, a hearing is held before Judge Low. Nelson-Waggoner was not present. Caine informed the trial court that defendant has requested his withdrawal as counsel (R. 214). On November 17, 1999, another hearing was held and over the objection of Nelson-Waggoner, Caine was ordered to remain as counsel (R. 230).

On November 24, 1999, a pre-trial conference was held (R. 231-32).

On December 17, 1999, Nelson-Waggoner filed a Notice of Alibi pursuant to Utah Code Annotated § 77-14-2 (R. 224). On December 23, 1999, Nelson-Waggoner filed an Amended Notice of Alibi which modified the name of “Heather Jordan” to “Heather Logan” (R. 235).

On January 2, 2000, the State filed an Amended Information changing the date of the offense from “November 17, 1996, to November 30, 1996” to “November 17, 1996” (R. 52--File I, left side).

On January 7, 10 and 11, 2000, a jury trial was held in Weber County, with Judge Gordon Low presiding. On January 11, 2000, Nelson-Waggoner was convicted by a jury of Aggravated Sexual Assault (R. 302). Jury Instruction #2 listed the date of offense as “November 17, 1996” (R. 283). The jury deliberated for approximately 4.5 hours (R. 270).

On February 8, 2000, Nelson-Waggoner filed a Motion for Mistrial and/or New Trial (R. 311). On March 13, 2000, the Court denied Nelson-Waggoner’s motion (R. 357, 3/13/00 Tr. At 2).

On March 13, 2000, Nelson-Waggoner was sentenced to 10 years to life in the Utah State Prison; the sentence was to run consecutive to the sentence imposed on a prior first degree felony conviction (R. 358).

On April 10, 2000, Nelson-Waggoner filed a notice of appeal in First District Court (R. 369).

On April 16, 2004, the Utah Supreme Court issued its opinion affirming the findings and decision of the trial court, a copy of which is attached hereto.

STATEMENT FO RELEVAT FACTS

A. Testimony of K.W.

Preliminary Hearing Testimony

At the preliminary hearing on October 15, 1997, K.W. testified on direct examination that Nelson-Waggoner assaulted her on the weekend before Thanksgiving in 1996. Specifically, counsel asked her:

Q: "Now, you are fairly sure that this was the weekend before Thanksgiving in 1996?"

A: "Yes, I'm definitely sure."

(10/15/1997 Tr. At 16). K.W. testified that she met Waggoner on Friday, November 22, 1996, and that the alleged incident occurred two days later on Sunday, November 24, 1996 (10/15/97 Tr. At 5-6, 8-14).

Trial Testimony

K.W. testified that she was then living in Logan, Utah in November 1996 (1/10/00 Tr. at 6). K.W. testified that she had only recently moved to Logan from Provo, and at that time she had very few friends (1/10/00 Tr. at 6). K.W. testified that the first time she met the defendant, Stacey Nelson-Waggoner, was at a dance club on Friday night, November 1996 1/10/00 Tr. at 4-5, 6).

K.W. testified that she believe that the dance club did not serve any alcohol (1/10/00 Tr. at 6). K.W. testified that she went to the dance club with her friend Rene (1/10/00 Tr. at 7). K.W. testified that while she was at the dance club, Nelson-Waggoner "called me up to him" (1/10/00 Tr. at 7). K.W. testified that she thought Nelson-Waggoner was "really open and nice and talked about his family and church" (1/10/00

Tr. at 8). K.W. testified that she learned that Nelson-Waggoner was a football player and lived in Logan (1/10/00 Tr. at 8). K.W. testified that she danced with Nelson-Waggoner one time that night and gave him her phone number in anticipation of meeting new people (1/10/00 Tr. at 8).

K.W. testified that the lighting was sufficient at the dance club to recognize people and distinguish facial features (1/10/00 Tr. at 39-40). K.W. testified that Nelson-Waggoner was wearing gold jewelry at the dance club (1/10/00 Tr. at 44). K.W. testified that she was wearing jeans and a nice shirt or blouse at the dance club and that her hair was "down to my waist in box braids" (1/10/00 Tr. at 37-8). K.W. testified that she left the dance club with her friend, and did not remember seeing or going over to Nelson-Waggoner's car (1/10/00 Tr. at 51).

K.W. testified that on the next day, Saturday, Nelson-Waggoner "called me and asked me if we would meet and, you know, we could go out to lunch or something the next day" (1/10/00 Tr. at 9). K.W. testified that they decided to meet at Frederrico's Pizza for lunch "right around noon or one, right around lunch time" (1/10/00 Tr. at 9).

K.W. testified that her memory of the events on Friday at the dance club were "probably less clear" than her memory of the vents that occurred on Sunday, because Sunday "was traumatic. It was a totally different thing. It's a thing that's affected my life until now, how I live my life" (1/10/00 Tr. at 10). K.W. testified that she remembered the facts on Sunday in November 1996 very well (1/10/00 Tr. at 10,30).

K.W. testified that she met Nelson-Waggoner on Sunday at Frederico's Pizza (1/10/00 Tr. at 11). K.W. testified that she was dressed in blue jeans and a sweater and that Nelson-Waggoner was dressed in a suit and tie, and the he "told me that he had just come from church" (1/10/00 Tr. at 11). K.W. testified that she and Nelson-Waggoner went into Frederico's Pizza when Nelson-Waggoner decided "he wasn't really in the mood for pizza", so they decided to go to McDonald's (1/10/00 Tr. at 11). K.W. testified that Nelson-Waggoner suggested that they go to his dorm parking lot and "we would park my car and he would - I would get in his and we would go together and I didn't see a problem with that" (1/10/00 Tr. at 11).

K.W. testified that instead of going to McDonald's, she wanted to go to Wendy's instead, "so we went to Wendy's" (1/10/00 Tr. at 12). In K.W. statement to the Police, K.W. wrote that they went to McDonald's (1/10/00 Tr. at 12).

K.W. testified that as they left the drive through at Wendy's, Nelson-Waggoner "asked if he could say goodbye to a friend of his" (1/10/00 Tr. at 13). K.W. testified that she agreed and "we ended up at the frat house, and he asked me if I would just wait in the car and I did and he returned five or ten minutes later" (1/10/00 Tr. at 13).

K.W. testified that Nelson-Waggoner drove her up to his dorm room (1/10/00 Tr. at 13). K.W. testified that she could not remember the exact make of the car, but thought "it was an all-wheel drive vehicle like a Pathfinder, it was green with tinted windows" (1/10/00 Tr. at 14). K.W. testified that Nelson-Waggoner told her that he would call some of his friends so she could meet them (1/10/00 Tr. at 14). K.W. testified that Nelson-Waggoner did not bring any friends for her to meet (1/10/00 Tr. at 14). K.W. testified that she went with Nelson-Waggoner to his dorm and she described in detail the appearance of Nelson-Waggoner's dorm room (1/10/00 Tr. at 14-15).

K.W. testified that she first entered Nelson-Waggoner's room, she "went to the closest corner of the bed to the door" and sat down on Nelson-Waggoner's bed (1/10/00 Tr. at 17). K.W. testified that Nelson-Waggoner left the room and changed his clothes (1/10/00 Tr. at 17). K.W. testified that Nelson-Waggoner changed into sports shorts and "a shirt that had the sides cut out" (1/10/00 Tr. at 17). K.W. further testified that she noticed Nelson-Waggoner "was ashy, he looked like he needed lotion and his feet were gross....He had stretch marks on his arms" (1/10/00 Tr. at 18). K.W. testified that Nelson-Waggoner hung up his church clothes and then "picked up the phone and seemed to me that he made two phone calls" (1/10/00 Tr. at 18).

K.W. testified that after the phone calls, Nelson-Waggoner "came back and set on the bed by me" (1/10/00 Tr. at 19). K.W. testified that she had been watching TV while Nelson-Waggoner was changing his clothes (1/10/00 Tr. at 19). K.W. testified that she noticed two pictures of two little girls on Nelson-Waggoner's corkboard, and he said that "they were his little girls...and he then showed me a tattoo that he has on his arm of the little girls' names" (1/10/00 Tr. at 19). K.W. further testified that "I have two [tattoos] and it kind of make for a conversation" (1/10/00 Tr. at 19).

K.W. testified at this point, Nelson-Waggoner sat down next to me and told me that I was cute and that I was pretty and kind of made me feel a little uncomfortable and turned and pinned my arms above my head, pushed my down on the bed and pinned my arms above my head and held me there and he kissed me and ran his hand down on to my chest. And the second he took his lips off my face, I told him, I didn't come here for this, stop. He said, If you didn't come here for this, they why did you come? And he -- bit my neck really hard, He left teeth marks in my neck and he brought blood to the surface. It wasn't a bruise like a hickey. It was raised blood right under the surface where you can see little dots of blood. And I told him if he didn't stop that I would scream and he didn't stop, so I screamed and he let me go and I ran out of there.

(1/10/00 Tr. at 20).

K.W. further testified that she "was scared that he was going to follow me" (1/10/00 Tr. at 20). K.W. also testified that as she was leaving, she met two girls on the elevator and "they asked me what was wrong and I said nothing" (1/10/00 Tr. at 20-1). K.W. testified that she was too scared to talk with anybody (1/10/00 Tr. at 21). K.W. testified that she got in her car and drove home. (1/10/00 Tr. at 21).

K.W. testified that she "cried all the way home" (1/10/00 Tr. at 22). K.W. testified that she finally decided to tell her mom what happened, but her mom "had concerns that if he could do that to me then what else could he do, and I wanted to protect my family" (1/10/00 Tr. at 22). K.W. testified that she decided to not report the incident (1/10/00 Tr. at 22).

K.W. testified that two days later, Nelson-Waggoner "called to ask me out and I told him to forget me, to forget he ever met me, to forget my phone number and I didn't ever want to see him again and I hung up on him" (1/10/00 Tr. at 25).

K.W. testified that at the preliminary hearing, she testified that the incident occurred on November 24, 1996 "because I felt pressured to nail down a date" (1/10/00 Tr. at 24). K.W. also testified that at the preliminary hearing she said "I'm definitely sure" that the event occurred over the weekend before Thanksgiving 1996 (1/10/00 Tr. at 54). K.W. testified that the incident did not happen after Thanksgiving (1/10/00 Tr. at 33). K.W. also testified that the incident did not happen the first weekend of November

(1/10/00 Tr. at 34). K.W. testified that the incident occurred on a Sunday (1/10/00 Tr. at 36). K.W. testified that the incident has had a severe impact on her life. She testified that "I used to be a very trusting person...I don't trust anybody anymore" (1/10/00 Tr. at 26). K.W. further testified that any time her husband travels, she goes to stay with her mother (1/10/00 Tr. at 27).

K.W. testified that the man that did this to her was the defendant (1/10/00 Tr. at 28). K.W. stated "I'm totally certain that it was the defendant (1/10/00 Tr. at 75).

K.W. testified that no one had told her that Nelson-Waggoner was not even in the State of Utah on November 22, 23, and 24, 1996 (1/10/00 Tr. at 66). K.W. testified that she had not sat down with any of her friends at the Bay or other people that remembered what happened on Sunday (1/10/00 Tr. at 75).

B. Testimony of Sharon McCarron

Sharon McCarron testified that the victim, K.W., is her daughter (1/10/00 Tr. at 77). McCarron testified that in November of 1996, K.W. was living with her in Logan Utah (1/10/00 Tr. at 77-9). McCarron testified that on Sunday in November, "my daughter had told a young man that she had met at a dance in Salt Lake that she would meet him for lunch and not--not knowing him any more than that and I was a little concerned, I asked her not to" (1/10/00 Tr. at 78). McCarron testified that K.W. said "he's very nice, he's going to introduce me to some friends around here and get me acquainted" (1/10/00 Tr. at 78). McCarron testified that this occurred "before Thanksgiving, I remember that" (1/10/00 Tr. at 93).

McCarron testified that it was about noon when her daughter left, and about an hour or so later, K.W. returned and "was extremely upset crying and almost hysterical, very upset" (1/10/00 Tr. at 78). McCarron further testified that K.W. then asked her niece "to go in with her to the bathroom or the bedroom....and they were in there quite awhile and she came out and she told me she had something to tell me and she showed some bite marks on -- and the young man had assaulted her and tried to rape her" (1/10/00 Tr. at 79).

McCarron testified that the bite marks were "on the right side, one sort of forward, one smaller behind" (1/10/00 Tr. at 79). McCarron testified "I was amazed at

how quickly something can bruise. They were black and blue with lighter color teeth marks in them” (1/10/00 Tr. at 79).

McCarron also testified that a few days later, a male called and she handed the phone to K.W., and “she stated screaming, don’t call me again, forget my number and hung up the phone on him. Oh, she said, How dare you call me.” (1/10/00 Tr. at 80, 95).

McCarron testified that K.W. was terrified to leave the house and she still is (1/10/00 Tr. at 80). McCarron testified that K.W. is married now and she can’t stay alone” (1/10/00 Tr. at 81).

McCarron testified that she talked K.W. out calling the police because “my husband is partially paralyzed...[and] because of her father and my situation, he’s not strong and I was afraid of retaliation of some kind. I didn’t know what we were dealing with but I was frightened” (1/10/00 Tr. at 81).

C. Testimony of Absent Witness

Defense counsel read to the jury the following stipulation:

That if witness were called in the trial, they would have said that the defendant, Stacey Waggoner, left from Salt Lake City airport at 9:55 p.m. on Thursday November 21st, 1996 on a Friday for Phoenix, Arizona where he arrived at 11:24 p.m. He was picked up at the airport and spent from the date until Tuesday December 3rd, 1996 residing with his mother and brother visiting relatives over the Thanksgiving holiday. He returned to Salt Lake City on a Friday from Phoenix, Arizona arriving in Salt Lake at 9:18 p.m. on Tuesday December 3rd, 1996. Therefore, between the dates of November 21st, 1996 and 9:55 p.m. December 3rd, 1996 the defendant was either was either in the air, in the state of Arizona and was not in the state of -- state of Utah, and more particularly, not in Logan, Utah (1/10/00 Tr. at 98).

D. Testimony of Jocelyn Parry

Jocelyn Parry testified that she attended Utah Sate University in Logan for five years and graduated in 1999 (1/10/00 Tr. at 100). She testified that she was living in Logan in November of 1996 in the Chi Omega Sorority house (1/10/00 Tr. at 100-1). Parry testified that she knew the defendant through his brother Spencer Waggoner

(1/10/00 Tr. at 101-2). Parry testified that she met Spencer Waggoner at the LDS Church in the 35th ward (1/10/00 Tr. at 102). Parry testified that Spencer was a member of the LDS church and played on the Utah State football team (1/10/00 Tr. at 103). Parry testified that Stacey Nelson-Waggoner was not a member of the LDS church, but he would occasionally visit (1/10/00 Tr. at 121-2).

Parry testified that she accompanied Stacey Nelson-Waggoner, his brother Spencer Waggoner, her roommate Heather, and others to the Bay dance club on Friday November 15, 1996 (1/10/00 Tr. at 107). Parry testified that the club was pretty lit and that you could see people and make out their features (1/10/00 Tr. at 108). Parry testified that they traveled to the dance club in two cars: the defendant's green Isuzu Rodeo and her roommate's car (1/10/00 Tr. at 109).

Parry testified that she saw the woman that Nelson-Waggoner was dancing with at the club (1/10/00 Tr. at 111). Parry testified that she saw the woman that Nelson-Waggoner was dancing with go out with Nelson-Waggoner to his car (1/10/00 Tr. at 111). Parry testified that she could not pick out the woman in the courtroom that the defendant was dancing with, but she could describe what she looked like that night (1/10/00 Tr. at 111). She testified that the girl that the defendant was dancing with had long braids "in her hair" (1/10/00 Tr. at 112).

Parry testified that on November 9, her friends gave her a surprise birthday party and she was pretty sure she did not go to church the next day (1/10/00 Tr. at 113). Parry also testified that while at sacrament meeting a church, Nelson-Waggoner noticed that Parry's birthday was not listed on ward newsletter, a monthly publication by the 35th ward (1/10/00 Tr. at 104, 114). Parry testified that Nelson-Waggoner scribbled Parry's birthday on the handout while in sacrament meeting (1/10/00 Tr. at 114-5). Parry testified that the ward calendar was probably handed out once a month (1/10/00 Tr. at 125).

Parry testified that she did not remember whether the three hour block of church was from 11 to 2 or 9 to 12, but she testified that sacrament was the last meeting (1/10/00 Tr. at 115-6). Parry testified that she did not remember going out to lunch after church with the defendant on November 17, 1996 (1/10/00 Tr. at 117). Parry also testified that it was a normal practice for them to stay after church at 15 or 20 minutes and socialize (1/10/00 Tr. at 118). Parry further testified that she did not recall Nelson-Waggoner

telling her that he had to meet someone right after church that day, something he normally would have done (1/10/00 Tr. at 118-9). Parry testified that Nelson-Waggoner came to church about “two or three” times (1/10/00 Tr. at 122). Parry also testified that she thinks Nelson-Waggoner went to church only once in November (1/10/00 Tr. at 128). Parry testified that she was sure she went to church on November 17, 1996 (1/10/00 Tr. at 126). Parry also testified that she thinks Nelson-Waggoner went to church with her on November 17, 1996 (1/10/00 Tr. at 135). Parry testified that she did not remember seeing Nelson-Waggoner in a suit at church (1/10/00 Tr. at 137).

E. Testimony of Heather Logan

Heather Logan testified that she attended Utah State University from the fall of 1994 to the winter of 1997 (1/10/00 Tr. at 139). Logan testified that she was living at the Chi Omega Sorority house in November of 1996 and was roommates with Jocelyn Parry (1/10/00 Tr. at 114). Logan testified that she was a member of the LDS church and attended the 35th ward in Logan (1/10/00 Tr. at 141).

Logan testified that she went to the Bay dance club with Jocelyn Parry, Stacey and Spencer Waggoner, and others on a Friday night in November of 1996, but she did not remember the date (1/10/00 Tr. at 143). Logan testified that they traveled in her car and the defendant’s car to the dance club that Friday night (1/10/00 Tr. at 143). Logan testified that Nelson-Waggoner’s car that they traveled in was green “Rodeo or whatever they are called” (1/10/00 Tr. at 144).

Logan testified that the club had “normal” lighting, “it wasn’t too dark” and light enough to identify people close to you (1/10/00 Tr. at 146). Logan testified that she couldn’t remember whether Stacey Nelson-Waggoner was dancing with someone that night but she knew “that he was talking to another person that wasn’t a pair of our group” (1/10/00 Tr. at 146). Logan testified that she saw the girl that was talking with Nelson-Waggoner inside the dance club outside by the defendant’s car, and that she noticed “her hair was long and braided” (1/10/00 Tr. at 148). Logan also testified that she saw the girl with long braids get into Nelson-Waggoner’s car that night (1/10/00 Tr. at 169). Logan further testified that as of November 1996, she considered herself a friend of Nelson-Waggoner (1/10/00 Tr. at 150).

Logan testified that she recognized Defendant's Exhibit No. 2 as the 35th ward newsletter (1/10/00 Tr. at 151). Logan testified that she did not recognize whose handwriting was on the newsletter (1/10/00 Tr. at 152). Logan also testified that she did not remember what date Nelson-Waggoner attended church in November of 1996 (1/10/00 Tr. at 154).

Logan testified that she did not know what time church service was held, "but it seemed early in the morning" (1/10/00 Tr. at 155). Logan testified that sacrament meeting was the last meeting, and after that, they would "probably either talk...to the bishop or talk to you friends" after church was over for "maybe 20 minutes, maybe longer" (1/10/00 Tr. at 155, 156). Logan testified that she would usually go out to lunch with defendant after church if he attended (1/10/00 Tr. at 154). Logan testified that Nelson-Waggoner went to church "maybe three" times from October through January of 1997 (1/10/00 Tr. at 158). Logan testified that she did not remember if she went out to lunch with Nelson-Waggoner after church in November 1996 (1/10/00 Tr. at 161-62).

Logan testified that Nelson-Waggoner did not tell her that he had any plans with a woman on Sunday the 17th or 24th of November 1996 (1/10/00 Tr. at 156). Logan testified that Nelson-Waggoner would normally tell her about him making plans with women, "he was really open about things, he would tell us. If he was going out with a girl" (1/10/00 Tr. at 156).

F. Testimony of Spencer Waggoner

Spencer Waggoner testified that he is the defendant's older brother (1/10/00 Tr. at 172). Spencer Waggoner testified that he was living in Logan November 1996, playing football for the Utah State University (1/10/00 Tr. at 173).

Spencer testified that he went with Parry, Logan, and others to the Bay Club in Salt Lake City on November 15, 1996 (1/10/00 Tr. at 178). Spencer testified that they traveled in two cars, Logan's and the defendant's (1/10/00 Tr. at 178). Spencer testified that the defendant's car was "forest green, dark green" (1/10/00 Tr. at 178).

Spencer testified that the lighting at the dance club was sufficient so that you could see what people were wearing and see their facial features (1/10/00 Tr. at 179). Spencer testified that at the dance club, the defendant was with another girl not in their

group (1/10/00 Tr. at 179). Spencer testified that the girl “was probably five-two, if that” and had “long braids” (1/10/00 Tr. at 179). Spencer testified that he saw this girl sitting in the defendant’s truck after everyone left the dance club (1/10/00 Tr. at 181).

Spencer testified that he was a member of the LDS church, Logan 35th ward (1/10/00 Tr. at 175). Spencer testified that he tore his quadriceps muscle during a football game on November 9, 1996, so he attended church on November 17 or 24, 1996 (1/10/00 Tr. at 177). Spencer further testified that the defendant was with him at church on November 17, 1996 (1/10/00 Tr. at 182). Spencer further testified that the defendant usually only went to sacrament meeting, but “this Sunday was specifically remembered because he went through all three of the certain meetings” (1/10/00 Tr. at 190). Spencer also testified that Parry and Logan were at sacrament meeting that day (1/10/00 Tr. at 182). Spencer testified that he could not remember the exact meeting times of the 35th ward (1/10/00 Tr. at 182). Spencer testified that the defendant did not leave the sacrament meeting early (1/10/00 Tr. at 185). Spencer testified that the defendant left church with Parry and Logan (1/10/00 Tr. at 185).

Spencer testified that Defendant’s Exhibit No. 2 was the 35th ward newsletter (1/10/00 Tr. at 175-6). Spencer further testified that a person could get a newsletter any time of the month (1/10/00 Tr. at 177). Spencer testified that the handwriting on the newsletter was the defendant’s (1/10/00 Tr. at 184).

Spencer testified that he borrowed the defendant’s vehicle Saturday, November 16, 1996, to take “a couple of my buddies who were big guys” to a party because “we couldn’t fit in my Honda car” (1/10/00 Tr. at 187). Spencer testified that he did not return the defendant’s car that night, but used it on Sunday and “went to Ogden, went to Dillard’s because Dillard’s is open on Sunday in Ogden” (1/10/00 Tr. at 188-9). Spencer testified that he took the defendant’s car to Ogden because “my car would not make it to Ogden” (1/10/00 Tr. at 192). Spencer testified that he had the defendant’s green Rodeo the while time from Saturday night to Sunday night (1/10/00 Tr. at 189-90).

Spencer also testified that the defendant was using his car during Sunday, November 17, 1996 (1/10/00 Tr. at 202). Spencer testified that Officer Milne called him about two weeks prior to the trial and sked him questions about him trading cars with the defendant (1/10/00 Tr. at 202). Spencer testified that he stated to Officer Milne “I just

really don't want to talk to you" (1/10/00 Tr. at 203). Spencer testified that he didn't remember telling Officer Milne that the reason he traded cars with the defendant was that the defendant's car was broken down (1/10/00 Tr. at 203). Spencer also testified that Sergeant Milne never asked him if it was okay to tape record their conversation (1/10/00 Tr. at 205).

SUMMARY OF PETITION

Nelson-Waggoner asserts that the trial court erred in allowing the State to amend the information two days before trial and change the date of the offense from a two-week period to a specific date; and that his substantial rights were prejudiced as a result of the amendment. Nelson-Waggoner contends that this violated his right to due process guaranteed by the 14th Amendment of the United States Constitution. Although the record on appeal is silent as to any discussion or objection as to the amendment of the information, Nelson-Waggoner asserts that this Court should review this issue under the exceptional circumstances doctrine because of the unique procedural circumstances of this case and in order to ensure that a manifest injustice will not result. Alternatively, defendant asks that this Court review this issue under a manifest injustice/plain error standard. Regardless, of the reviewing standard used this Court, Nelson-Waggoner asserts that the trial court's error in allowing the State to amend the information requires a reversal of his conviction.

Nelson-Waggoner also asserts that he was denied the right to effective assistance of counsel guaranteed by the 6th Amendment of the United States Constitution. One, trial counsel failed to object to the amendment of the information. Two, trial counsel failed to contemporaneously object to the prosecution's numerous indirect references to Nelson-Waggoner's failure to testify at trial in violation of his Fifth Amendment rights. Nelson-Waggoner also asserts that he was prejudiced by these deficiencies and that he should be afforded a new trial because of them.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY ALLOWED THE STATE TO AMEND THE INFORMATION TWO DAYS BEFORE TRIAL

Nelson-Waggoner asserts that it was error for the trial court to allow the State to amend the information in the case two days before trial and to instruct the jury that the date of the offense was “November 17, 1996” (R. 52, 283) rather than “November 17, 1996, to November 30, 1996” (R. 1). The record is silent as to any discussion or objection as to this issue but Nelson-Waggoner asserts that this Court should nonetheless under an “exceptional circumstances” standard.

The exceptional circumstances concept serves as a “safety device”, to assure that “manifest injustice does not result from the failure to consider an issue on appeal.” *State v. Archambeau*, 820 P.2d 920, 923 (Utah App. 1991). *Accord State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994). “Unlike ‘plain error’, ‘exceptional circumstances’ is not so much a precise doctrine, which may be analyzed in terms of fixed elements, as it is a descriptive term used to memorialize an appellate court’s judgment that even though an issue was not raised below and even though the plain error doctrine dose not apply, unique procedural circumstances nonetheless permit consideration of the merits of the issue on appeal.” *State v. Irwin*, 924 P.2d 5, 8 (Utah App. 1996), *cert. denied*, 931 P.2d 146 (Utah 1997). *See also, State v. Scott*, 22 Utah 2d 27, 28, 447 P.2d 908, 910 (1968) (“[T]here may be exceptional circumstances when errors not excepted to are so clearly erroneous and prejudicial to the fundamental rights of a defendant that an appellate court will of its own accord take notice thereof.”). Nelson-Waggoner asserts that this issue presents this Court with unique procedural circumstances that merit consideration of the merits of this issue on appeal and that the failure of this Court to review this issue will result in a manifest injustice.

Alternatively, Nelson-Waggoner asserts that this Court may review this issue in order to avoid a manifest injustice as defined by Rule 19(e) of Utah Rules of Criminal Procedure or for plain error as set forth in *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993). Rule 19(e) of the Utah Rules of Criminal Procedure provides that jury instructions that were not objected to may still be reviewed “to avoid a manifest injustice”. Manifest injustice is typically reviewed under a “plain error” standard of review. *Irwin*, 920 P.2d at 10 n.5. In other words for this Court to reverse under a “manifest injustice” standard the error must be “obvious” and “be of sufficient magnitude that it affects the substantial rights of a party.” *State v. Rudolph*, 920 P.2d 1221, 1226 (Utah 1998). To demonstrate plain error, Nelson-Waggoner must establish the following: “(i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful...” *State v. Medina-Juarez*, 2001 UT 79, ¶18, 34 P.3d 187 (citation omitted). In order to show that the error is harmful, Nelson-Waggoner must demonstrate that “absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.” *Id.*

Nelson-Waggoner asserts that in order for this Court to properly analyze this issue it is necessary to set forth in detail the procedural history of this case:

The original information filed in this matter on or about September 29, 1997, specified that the alleged aggravated sexual assault against K.W. occurred on or about “November 17, 1996, to November 30, 1996” (R.2). On October 15, 1997, a preliminary hearing was held. The only witness at the preliminary hearing was, K.W., the alleged victim. K.W. testified that she was “definitely sure” that the assault took place on Sunday, November 24, 1996--the weekend before Thanksgiving (10/15/97 Tr. at 5-6, 8-14, 16). In fact, at preliminary hearing, it was counsel for the State, Donald Linton, who introduced the weekend before Thanksgiving as the time frame for the offense in his questions of the victim, K.W.:

Linton: [K.W.] I want to draw your attention, if I could, to the week prior to Thanksgiving of 1996. Do you recall that time?

K.W.: Yes, I do.

Linton: Do you recall the Friday, that would be the 22nd, 1996, the week prior to Thanksgiving of that year?

K.W.: Yes, I do.

(10/15/97 Tr. at 4-5). Based solely on K.W.'s testimony, Nelson-Waggoner was bound over for trial on the charge upon a finding of probable cause.

On September 2, 1999, Nelson-Waggoner filed a Motion for a Bill of Particulars requesting that the State specify with particularity the "place, date and time of the commission of the offense against [K.W.]" (R. 1996). On October 1, 1999, Nelson-Waggoner filed a Motion to Require Specification of Date and Time of Offense (R. 467). Nelson-Waggoner argued that the notice provided by the state (the alleged offense occurred on or about November 17, 1996 to November 30, 1996) was constitutionally inadequate to permit him to prepare his defense and that there was information available to the State to enable them in "pinning down the date and time of the alleged offense" (R. 471).

On September 21, 1999, a hearing was held where the motion for a bill of particulars was discussed (9/21/99 Tr. 39-). At the hearing, Nelson-Waggoner requested that the State be more specific as to when the crime occurred than the two-week period set forth in the information (9/21/99 Tr. at 40). The following discussion then occurred between the parties and the trial court:

Wyatt: The police report that we provided answered the question to the best that we know...

Court: You cannot specify the exact date?

Wyatt: It was on Sunday between those dates. We've narrowed it down to two or three dates.

Court: That's as close as you're able to come?

Wyatt: Yes.

Court: ...Well, I'm not going to get into what happened here. I'm just telling you that the state has an affirmative obligation, which I think they recognize, to supply all the information they have. That doesn't mean that they can't prosecute the case if they don't have the exact date of the alleged occurrence. But if they do have it they have to supply it. If I understand Mr. Wyatt's response, they've given you all they have, all they know, and are unable to specify an exact date of occurrence.

Court: Let's be more practical about it. You're (the State) not going to get up in front of the jury and have either your victim testify, or you in opening statement, say it occurred on November 24th, correct?

Brown: Well, the prlim testimony was elucidating on that. They specified a date in the preliminary hearing.

Court: Okay. And you have that?

Wyatt: I don't think that's there. We'll review that as well.

Court: What I'm saying, if you have a date that you're going to talk to this jury about either through statement or testimony, disclose it. If you don't then you are precluded from disclosing it at that time. That's the purpose for a bill of particulars. I don't think you can say we don't know when it was and have a witness say I know exactly when it was.

Brown: I don't know what to rely on. I mean, I've got an information that charges a series of times and I've got preliminary hearing testimony which I think --

Court: What can I do, Mr. Brown, in aid of your motion for a bill of particulars?

Brown: I don't think anything other than what you've done. What they've said is that they can't be any more specific that the information. So I don't know what you can do. They can give me an opportunity to talk to the victim, you can order that.

Court: Will that aid you in determining the date of the alleged occurrence?

Brown: I'd ask her that.

Court: Well, there's an easier way of getting at it and that is if they're unable to tell you now, since that have talked to her, they're precluded from having testimony as to the exact date at the time of trial.

Wyatt: Mr. Brown shows me in the preliminary hearing transcript that she points out a particular date.

Court:I think the bill of particulars puts the station notice that whatever they have they have to supply to you. If they have further information forthcoming at trial, they're precluded from presenting it. That's the reason for the rule. Whatever they have they have to disclose. Failure to disclose it prevents them from using that testimony.

(9/21/99 Tr. at 40-43).

On October 12, 1999, a hearing was held where Nelson-Waggoner's request for a bill of particulars and for specification of date and time of offense were discussed (10/12/99 Tr.). At this hearing, defense counsel stated:

When we were before the court on the [21st] of September, the State responded orally to that motion for a bill of particulars that they could not be any more specific than what the information said and what the preliminary hearing transcript disclosed.

At the preliminary hearing, the witness testified that she was certain that it happened on the 24th. I believe that's a fair characterization of her preliminary hearing testimony.... So, based upon that state of the record, the defense has prepared for the 24th of November, 1996, and have in place alibi evidence concerning the date, solid confirmable alibi evidence that he--that basically is going to be refuted--that the 24th he was not in the State of Utah (10/12/99 Tr. 8-9). The Court responded: "He was in Phoenix for the Thanksgiving holiday" (10/12/99 Tr. at 9). Later in the same hearing counsel for the State made the following comments:

...[T]he State, from the very beginning, has maintained that this occurred between the time of the 17th to the 30th, that it was on a Sunday. And that makes the offense either the 17th or the 24th, most likely"

(10/12/99 Tr. at 18).

... We have talked with [K.W.], and she's not certain of what the day is. We have never said, and it not in this letter, that she's going to testify that it was the 17th. I happen to believe that this occurred on the 17th, but she hasn't told us that's what

she's going to testify to. My anticipation is that she will either say it was the 24th or that it was one of--or consistent with her original was to police, that she's not sure which day it was. But it was a Sunday shortly before Thanksgiving.

(10/12/99 Tr. at 19-20)

On or about October 12, 1999, the State submitted proposed jury instructions. One of the proposed instructions listed the elements of the crime and indicated that the aggravated sexual assault against K.W. occurred "on or about November 17 through November 30, 199" (R. 566). The trial that was scheduled for October of 1999 was continued at the October 12, 1999, hearing.

On October 8, 1999, Nelson-Waggoner filed a Notice of Alibi (R. 523). The notice informed the prosecution his intent to call witnesses to provide evidence that he was in the Cache County area on November 17, 1999, but he was not with K.W. and that on November 24, 1996, he was in Phoenix, Arizona (R. 523-24). On November 17, 1999, Nelson-Waggoner filed a second Notice of Alibi (R. 244); and on December 23, he filed an amended notice of alibi which modified the name of "Heather Jordan" to "Heather Logan" (R. 235).

On January 5, 2000, the State filed an Amended Information changing the date of the offense from "November 17, 1996, to November 30, 1996" to "November 17, 1996" (R. 52--File I, left side).

On January 7, 10-11, 2000, a jury trial was held. During trial a stipulation was read to the jury which established that Nelson-Waggoner was in Arizona from the night of November 21 until December 3, 1996 (1/10/00 Tr. at 98). During opening argument counsel for the State specifically mentioned that the offense occurred on November 17, 1996 (1/10/00 Tr. at 154). In addition, when defense counsel attempted to discuss the discrepancies between K.W.'s preliminary hearing testimony, Nelson-Waggoner's alibi for the dates between November 21-December 3, and not the alleged "November 17th" date, the State objected and was sustained and defense counsel could only comment on November 17 as the date of the offense (1/10/00 Tr. at 163-66).

The jury instructed that the date of the offense was "November 17, 1996" (R. 283--Instruction #2; 1/10/00 Tr. at 147-48).

Nelson-Waggoner was convicted by the jury on January 11, 1996 (R. 302). The jury deliberated for approximately 4.5 hours (R. 270).

Nelson-Waggoner asserts that it was reversible error for the trial court to allow the State to amend the information in this matter--particularly two days before trial. Rule 4(d) of the Utah Rule of Criminal Procedure grants trial court's the discretion to "permit and indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced". Moreover, "[e]xcept when time is an express statutory element of the crime or when defendant claims time as a defense, 'the time of offense was committed is generally not an element which the prosecution must prove at trial'" *State v. Jamison*, 767 P.2d 134, 136 (Utah App. 1989) (quoting *State v. Fulton*, 742 P.2d 1208, 1213 (Utah 1987), *cert. denied*, 484 U.S. 1044, 108 S.Ct. 777, 98 L.Ed.2d 864 (1988)). However, the issue of time may be very important where defendant's defense is alibi. *State v. Copper*, 114 Utah 531, 540, 201 P.2d 764, 769 (Utah 1949).

Nelson-Waggoner asserts that the issue of the time of offense is very important in this case as he possessed a genuine alibi defense for a substantial part of the two-week period that was originally charged by the State--including the date of the offense (November 24) which the victim testified to at the preliminary hearing. Moreover, the amendment prejudiced and impeded substantial constitutional rights belonging to Nelson-Waggoner such as the rights to fundamental fairness and due process, and the right to present a defense--his theory of the case--to the jury.

Repeatedly prior to trial as set forth above, Nelson-Waggoner requested more specification as to the date and time of the offense based largely on the victim's testimony that the crime occurred on November 24, 1996. Repeatedly the State asserted that it had no more specific information than the offense occurred between "November 17 and November 30, 1996".

The trial court refused to grant Nelson-Waggoner's request for a bill for particulars and more specification as to the date and time of the offense. However, the trial court did state to the prosecution during the motion hearing that "if you have a date that you're going to talk to this jury either through statement or testimony, disclose it. If you don't then you are precluded from disclosing it at that time. That's the purpose for a

bill of particulars. I don't know you can say we don't know when it was and have a witness say I know exactly when it was" (9/21/00 Tr. at 41).

The trial court's decision to allow the information to be amended from a two-week period between November 17 and November 30, 1996, to solely "November 17, 1996" effectively allowed the State to circumvent Nelson-Waggoner's request for a bill of particulars/more specification as to the date and time of offense by allowing the State to accomplish by criminal information and jury instruction what they would not have been allowed to accomplish by statement or testimony--namely establish a particular date as the date of the offense. Moreover, the prosecutor's statement in opening argument that the date of the offense was "November 17" clearly circumvents the trial court's intended prohibition of such statements.

In addition, the amendment of the criminal information to November 17 stripped Nelson-Waggoner of his alibi defense and eliminated his ability to question the credibility of K.W. and her preliminary hearing testimony that the incident occurred on November 24. Such alibi evidence and preliminary hearing testimony are irrelevant if the date of the offense on which the jury is instructed is November 17.

The record demonstrates that the only new information that was possessed by the State which would cause them to seek an amendment of the original information was the solid evidence that Nelson-Waggoner was in Arizona from November 21-December 3, 1996. The State's theory then shifted from this assault occurred on a Sunday "before Thanksgiving" between November 17-November 30 to the assault must have occurred on November 17 as Nelson-Waggoner was out-of-state on November 24.

However, rather than allow the jury to decide when and if the assault occurred based on all the evidence--including K.W.'s preliminary hearing testimony and Nelson-Waggoner's alibi evidence, the trial court adopted the State's theory of the cause by allowing the information to be amended to a particular date and effectively stripped Nelson-Waggoner of his ability to effectively question K.W.'s credibility and his rights to due process (fundamental fairness) and to have his theory of the case heard.

Under these circumstances and because it caused prejudice to his substantial rights, Nelson-Waggoner asserts that it was error for the trial court to allow the State to

amend the information and to instruct the jury that the date of the offense was “November 17, 1996”.

Moreover, although the record is silent as to any discussion or objection to this amendment, Nelson-Waggoner asserts that this issue presents this Court with unique procedural circumstances that merit consideration of the merits. Nelson-Waggoner asserts that these unique procedural circumstances include the length of time between the alleged assault and trial (3 years); the repeated discussions between the parties and the trial court concerning the date and time of the offense and Nelson-Waggoner’s request for bill of particulars/specification of date and time of offense; the difference between the date of offense in the victim’s preliminary hearing testimony and the amended information; and Nelson-Waggoner’s alibi evidence. Nelson-Waggoner asserts that it is for this type of unique case for which the “exceptional circumstances” doctrine was created and that if this issue is not reviewed by this Court then a “manifest injustice” will result. *Archambeau*, 820 P.2d at 923.

Alternatively, Nelson-Waggoner asserts that his issue warrants review wither to avoid “manifest injustice” as defined under Rule 19(e) of the Utah Rule of Ciriminal Procedure or for obvious and harmful error under a “plain error” standard or review. Nelson-Waggoner asserts that the trial court’s decision to allow the State to amend the information was both obvious and prejudicial for many of the same reasons set forth above. One, it allowed the State to circumvent Nelson-Waggoner’s repeated attempts for more specification as to the date of the offense and the trial court’s decision that the State would be precluded from talking about specific date to the jury through statement or testimony. Two, it eliminated Nelson-Waggoner’s ability to effectively attack the credibility of K.W. as to the date of the offense. Three, it eliminated the jury as fact finder as to when and if the assault occurred by specifying a date.

Accordingly, Nelson-Waggoner asks that this Court reach the merits of this issue under the “exceptional circumstances” doctrine or under a manifest injustice/plain error standard of review. Nelson-Waggoner also asks that his Court conclude that the trial court erred in allowing the State to amend the information in this case that such an amendment prejudiced his substantial rights and requires a reversal of his conviction.

POINT II

NELSON-WAGGONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COMPETENT AND EFFECTIVE TRIAL COUNSEL

In order to establish ineffective counsel, “it is the Defendant’s burden to show: (1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel’s error.” *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hunt*, 781 P.2d 473, 477 (Utah App. 1989).

To satisfy the first prong of the *Strickland* test, Nelson-Waggoner must show the trial counsel’s representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *State v. Tenmyson*, 850 P.2d 461, 465 (Utah App. 1993). To meet this prong, defendants “must prove that specific, identified acts or omissions fall outside the wide range of professionally competent assistance.” *State v. Frame*, 723 P. 2d 401, 405 (Utah 1986). The second prong of the *Strickland* test is satisfied only by showing there is a reasonable probability that “but for counsel’s errors, the result of proceeding would have been different.” *Frame*, 723 P.2d at 405. A reasonable probability has been described as that “sufficient to undermine the confidence in the outcome.” *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Frame*, 723 P.2d at 405.

Nelson-Waggoner asserts that trial counsel’s performance was objectively deficient--and that he was harmed by these deficiencies--based upon the following arguments:

A. Trial Counsel failed to object on the record to the State’s filing of an Amended Information two days before and to jury being instructed that the date of the offense was November 17, 1996.

Should this Court decline to review the issue set forth in Point I of Appellant’s brief, Nelson-Waggoner asserts that this Court should examine this issue in regards to whether he was denied his Sixth Amendment right to competent trial counsel. Nelson-Waggoner asserts that trial counsel was deficient in failing to object on the record to the

State's proposed amended information which changed the date of the offense in order to eliminate much of his alibi defense. As argued above, amendment of the information in this case was inappropriate under Rule 4(d) of the Utah Rules of Criminal Procedure in light of the procedural history of the case, the preliminary hearing testimony of K.W., the repeated attempts of the defense for a bill of particulars/more specification of date and time of offense and the trial court's decision to deny that request but to preclude the State from eliciting a specific date through statement or testimony. Accordingly, trial counsel's failure to object to the amendment and to the jury being instructed only as to the November 17th date constitutes a deficient performance.

Moreover, Nelson-Waggoner asserts that he was prejudiced by this deficiency. Had the information not been amended then it would have been up to the jury to determine when and if the incident occurred and to determine the credibility of K.W. in light of her preliminary hearing testimony and Nelson-Waggoner's alibi evidence. With the amendment to the information, K.W.'s preliminary hearing testimony and the alibi evidence largely became irrelevant. For example, during opening argument counsel for the State commented as follows:

Now, you're going to hear that about a year after the fact [K.W.] was called to testify at a preliminary hearing. And during that preliminary hearing she said she thought the day this happened would have been the Sunday immediately before Thanksgiving, perhaps the 24th of November 1996, which she had originally reported in the police statement that it was shortly before Thanksgiving. It would have been in November.

It was on a Sunday for sure, but that she wasn't confident which day it was. A year after the fact she thought the Sunday immediately before. But when you hear her testify, you are going to hear her say, I'm really not sure what day it was but it was a Sunday shortly before Thanksgiving.

And you're going to hear a stipulation that it wouldn't have been the Sunday immediately before Thanksgiving because the defendant wasn't here in town in Logan. So the State has alleged that this occurred on or about the 17th day of November 1996.

(1/7/00 Tr. at 159-60)

Accordingly, Nelson-Waggoner asserts that trial counsel's failure to object to the amended information and to the jury being instructed as to a specific date of the offense, was deficient representation that was prejudicial and without such deficient conduct there was a reasonable likelihood of a more favorable result.

B. Trail Counsel failed to object to the prosecution's numerous indirect references to Nelson-Waggoner's failure to testify made during closing argument.

The State's closing argument contained numerous indirect references to Nelson-Waggoner's failure to testify which were highly inflammatory and prejudicial. The prosecution's statements violated Nelson-Waggoner's Fifth Amendment rights and his defense counsel's failure to object to these statements or ask the trial court for a curative instruction to the jury was ineffective assistance of counsel.

At closing argument, the prosecutor made the following comments regarding Nelson-Waggoner's failure to testify: (1) "and no one has told you when the defendant- where the defendant was or what he was doing on the 17th. No one else has told you, except for one person, and that is K.W." (1/11/00 Tr. at 16); (2) "The most critical fact you heard in this whole case was the only witness that took the stand and told you what happened, and that was K.W." (1/11/00 Tr. at 18); (3) "Nobody's told you where the defendant was in the afternoon, any time church got out, except for K.W." (1/11/00 Tr. at 20); (4) "Nobody knows where he (the defendant) is on the afternoon of the 17th, except for K.W. Nobody that testified except for K.W." (1/11/00 Tr. at 21-22); (5) "She (K.W.) told you that the defendant assaulted her, and that has not been controverted once" (1/11/00 Tr. at 25); (6) "And the defendant, again, called the defendant's brother and his two good friends. They took the stand, they were here available, and not once did they dispute that evidence. Not once did they say, no, he doesn't have any tattoos; or no, he doesn't have this or that; or what's she talking about or this or the other things? It's all true" (1/11/00 Tr. at 27); (7) "And the defense had an opportunity to say his tattoo was exposed at the Bay, he - his room looked different, and they didn't say anything about that" (1/11/00 Tr. at 72); (8) "No one has told you where the defendant was on the 17th of November, 1996, after 12:00 o'clock when the church got out except one person and that

is uncontroverted... And for you to find otherwise means you have to imagine or speculate facts, that were not presented as evidence, and it's your sworn duty to decide this case based on evidence that's presented to you at trial" (1/11/00 Tr. at 75); and (10) "[S]he told you the truth and there hadn't been a witness here that can say she didn't. Not one. Not one" (1/11/00 Tr. at 77).

1. The prosecution's comments during closing argument were inappropriate and infringed on Nelson-Waggoner's Fifth Amendment rights.

In closing argument, the prosecutor made repeated inferences to the fact that Nelson-Waggoner did not testify, leaving the jury with the impression that because Nelson-Waggoner did not testify he must be guilty and the alleged victim's accusations must be true. Because Nelson-Waggoner's conviction was based solely on the testimony of K.W. with no physical evidence, the prosecutor's comments constitute constitutional error that was not harmless beyond a reasonable doubt.

Indirect references to a defendant's failure to testify are constitutionally impermissible if the comments were manifestly intended to be or were of such a character that the jury would naturally and necessarily construe them to be a comment on the defendant's failure to testify. *State v. Tillman*, 750 P.2d 546, 554 (Utah 1987).

"Assuming a petitioner has established that a prosecutor's comments constituted a constitutional violation, reversal is warranted only if the error was not harmless." *Id.* At 555.

In *Tillman*, the Utah Supreme Court addressed the issue of prosecutorial misconduct in the context of statements in the closing arguments of a capital homicide case. The defendant asserted the "the prosecutor indirectly commented on his failure to testify at a trial and suggested to the jury that the defendant's silence implied guilt." 750 P.2d at 553. In discussing a witness' [Sagers] credibility, the prosecutor stated:

Now, you saw Carla Sagers sit on the stand. Did you see anything about her or any evidence about her that could show you that Carla Sagers, on her own, could take an ax or hatchet...and beat to death a guy like Mark Schoenfeld in the fashion you have seen done between one and five times, crushing his skull, spraying blood on the walls, apparently on clothing, and then wrap up all the

blood shirts and stuff and set fire on the bed on her own and walk out? There has been no evidence to show that she has that kind of mentality...

You can rest assured of one thing, Carla Sagers didn't have the guts to get out of [the relationship with defendant] if Lori Groneman didn't. And Lori Groneman said no cross-examination..., "I was scared to death of Elroy Tillman," and she's assertive. What do you think Carla Sagers was doing, or how she was feeling? And even after she's caught, even after extensive interrogation by myself ... and others, she still doesn't say anything derogatory about Elroy or try to cast blame on him or call him names or anything else. Even thought you may say to yourselves, "Carla Sagers isn't any better than Elroy Tillman," she did have a heart and she did tell the truth and she didn't demand immunity, she didn't demand an attorney or all the other things indicative of guilt. She told Chapman what had happened. Even tried to protect him. She told Steve Chapman what had happened.

Now remember this is two days after Elroy Tillman has already told Officer Chapman his alibi. What does he say about Carla Sagers when he's first talked to by Steve Chapman, and when I say "he", I am referring to Elroy Tillman. When he's asked if he knows a girl named Carla, he said, "Oh, yes, I sort of know a girl named Carla Sagers," and he spells it S-a-y-e-r-s. Now, a person who has gone with somebody for two years, taken them places... is either very dumb not to know how to spell the name or very cunning is not trying to give police officers a lead to Carla.

Tillman, 750 P.2d at 553-54. Additionally, during the discussion of how it was possible for defendant to persuade Sagers to help him with the murder, the prosecutor commented:

Some of us are fortunate enough not to meet a person who is capable of manipulating us for bad. Others of us are not so lucky and you have to pay that price and Carla Sagers, believe me, emotionally and otherwise, you could probably see her during the six and a half hours she was on the stand literally aging before your eyes and sometimes hell is worse than actually burning.

You have had a chance to look at Elroy Tillman during these proceedings. Detecting remorse? Detecting anything? You get a feel for people by what is said,

what they do, how they react, and I hope you were paying attention to that as well. You can never make sense, ladies and gentlemen, out of this type of a crime unless you take it a step at a time. One little bit of involvement leads to another, leads to another. And in doing so human history is met.

Id. at 554. Also, in response during the penalty phase to defense counsel's comments concerning Christianity, the Mosaic law, and religion in connection with the death penalty, the prosecutor noted:

I am always, I suppose, repulsed by the contention that [defense counsel] raises of the fact that the system has failed. Well, you are part of the system, ladies and gentlemen. Those prior felony convictions are from jurors like yourselves who have had to sit tedious [sic] hour upon hour and listen to and sift through facts to arrive at those convictions. And there is not a system on the face of the Earth, including the Mosaic law or the law of Christianity, that will work unless the individual soul wishes it to work. If that individual soul rebels against the most sacred of obligations, to protect human life, or chastity or the Ten commandments, or all the other things that Elroy Tillman has broken along the way, no system in the world will work without the person himself humility-wise and with remorse saying, "I want it to work," and you haven't heard Elroy Tillman say that.

In fact, if you have looked at Elroy Tillman you probably haven't seen one ounce of remorse other than to cast blame on the State's witnesses or the system or his being black or whatever you want to characterize the blame as.

Id. The Court found that the initial remarks "were intended to bolster Sagers' credibility and were not intended to contrast her decision to testify with the defendant's choice to remain silent." The Court also found that the remaining remarks "were intended to assess the defendant's courtroom demeanor, particularly in relation to Sagers' demeanor while she was on the witness stand." *Id.* at 555.

The Court further stated, *arguendo*, that even if the comments would naturally and necessarily be construed by a juror as a comment on defendant's silence, the error would be harmless beyond a reasonable doubt and would not warrant a reversal in this case because of the "overwhelming evidence of the defendant's guilt together with the

fact that the comments were isolated as opposed to extensive..." *Tillman*, 750 P.2d at 555.

In *State v. Carter*, 776 P.2d 886 (Utah 1989), another homicide case, the defendant argued that one specific, indirect comment made by the prosecutor undermined his right not to testify. The prosecutor stated, "I heard no evidence, evidence, [sic] from the witness stand about coercion or about inducing somebody to say anything about something that didn't happen. I heard no evidence that supports any other theory in this case than the theory by the State of Utah that he is guilty of first degree murder." *Carter*, 776 P.2d at 891.

The defendant did not testify, but he signed a confession that was admitted in court and two witnesses about the crime which paralleled his confession given to the police. *Carter*, 776 P.2d at 890.

The Court found that "the statement is question would [not] naturally and necessarily be construed by the jury as a comment on defendant's silence. Indeed, the comment was made in the context of focusing the jury's attention of defendant's confession..." *Carter*, 776 P.2d at 891. The Court reasoned that the prosecutor's statement "could refer to the lack of evidence elicited from witnesses or officers present during defendant's confession contradicting the State's theory of the case," and that the statement was "isolated," and the trial judge instructed the jury that "the fact that [defendant] has not taken the witness stand must not be taken as any indication of his guilt, nor should you indulge in any presumption or inference adverse to [him] by reason thereof." *Id.* The Court held that the defendant's claim was without merit. *Id.*

The prosecutor's statement which indirectly refer to Nelson-Waggoner's silence at trial in the present case are unlike the statements made in *Tillman* and *Carter*. In *Tillman*, the only plausible indirect statement that could undermine the defendant's right to not testify was the prosecutor's statement made at the penalty phase of the hearing regarding the judicial system and the death penalty: "no system in the world will work without the person himself humility-wise and with remorse saying, 'I want it to work,' and you haven't heard Elroy Tillman say that" *Tillman*, 750 P.2d at 554. This statement clearly did not refer to the defendant not testifying, as the Utah Supreme Court found.

And the Court stated that even if it did, the overwhelming evidence against the defendant establishing his guilt would not warrant a reversal. *Id.* at 555.

Likewise, in *Carter*, the Court found that the prosecutor's statement referred to the lack of the witnesses' statement contradicting the State's theory. *Carter*, 776 P.2d at 891. In both *Tillman* and *Carter*, only one plausible statement made by the prosecutors indirectly referred to the defendants' silence. In the present case, the prosecution made at least ten (10) separate statements that indirectly referred to the defendant's silence. Only one conclusion can be drawn from these facts, and that is that the prosecutor made a deliberate effort to comment on the fact that Nelson-Waggoner did not take the stand contradict K.W.'s testimony.

While a few of the prosecutor's statements regarding the defendant's silence are encased in "they" language, which might also refer to a lack of the witnesses' ability to contradict some of K.W.'s statements, the repeated statements intentionally drew the jurors' minds to the fact that not only did the witnesses not contradict K.W., but Nelson-Waggoner did not testify either and so he must be guilty because he did not contradict her testimony.

More damaging were the prosecutor's statements that referred specifically to the alleged incident itself. Comments 2, 5, 8, 9, and 10 above directly refer to the alleged incident and basically say that K.W. was the only person that testified as to what happened to her in Nelson-Waggoner's dorm room and because no one else told you what happened in that dorm room, you must believe K.W. The evidence is clear that the only other person that could have contradicted these statements that the prosecutor repeatedly made was Nelson-Waggoner; by pointing this fact out, the prosecutor indirectly reinforced in the minds of the jurors that Nelson-Waggoner failed to testify on his own behalf and that K.W.'s testimony must be accepted at face value and that the testimony was automatically proof beyond a reasonable doubt.

It is beyond doubt that the prosecutor's statement concerning Nelson-Waggoner's failure to testify were not harmless error beyond a reasonable doubt. Nelson-Waggoner was convicted solely on the basis of K.W.'s testimony. No physical evidence was introduced to substantiate her allegations. The prosecution effectively made the conviction based upon K.W.'s testimony and Nelson-Waggoner's silence.

The numerous separate and repeated comments made by the prosecutor in the closing argument stripped Nelson-Waggoner of his Fifth Amendment rights. The ten separate statements regarding Nelson-Waggoner's failure to testify and contradict K.W.'s testimony were impermissibly before the jury and requires this Court to reverse his conviction and order a new trial.

2. Trial Counsel was ineffective in failing to make a contemporaneous objection to the prosecutor's inappropriate comments.

Nelson-Waggoner's counsel failed to contemporaneously object to the prosecution's numerous indirect statements regarding his silence during trial and was thus denied his right to effective assistance of counsel. An individual has been denied the effective assistance of counsel if: (1) counsel's performance was deficient below an objectives standard of reasonable professional judgment, and (2) counsel's performance prejudiced the defendant." *State v. Martinez*, 2002 UT 12, ¶ 15 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)). When a defendant raises an ineffective assistance of counsel for the first time on appeal, the claim will be reviewed only 'if the...record is adequate to permit decision of the issue.'" *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998)(quoting *State v. Humphrise*, 818 P.2d 1027, 1029 (Utah 1991).

In order to make a motion for mistrial or a new trial predicated on a prosecutor's comments on the defendant's failure to testify, the defendant must "lodge a timely objection that would have allowed the court to mitigate any damage done by the prosecutor's comments." *State v. Hales*, 625 P.2d 1290, 1292 (Utah 1982).

In *State v. Hales*, the defense failed to object to statements made by the prosecutor that "come perilously close to, if they do not exceed, the limits of permissible comment" allowed before the prosecutor commits constitutional error by commenting on the defendant's right not to testify. 652 P.2d at 1292. After the verdict, the defense made a motion for a new trial based on the prosecutor's comments, but the Utah Supreme Court held that the defense's failure to either object to the prosecutor's comments regarding the defendant's failure to testify or make a motion for mistrial or a new trial before the verdict "may not be reviewed on appeal." *Id.* The Court reasoned that he defense must raise the objection in time to give the trial judge the opportunity to make curative

instruction to the jury "to draw no adverse inference from the defendant's failure to testify." *Id.*

In the present case, Nelson-Waggoner's counsel not only failed to object to the prosecutor's unconstitutional comments, but defense counsel attempted what the Supreme Court specifically outlined *Hales* what not to do: wait until after the verdict and then raise the motion for a new trial based on the prosecutor's comments (R. 311).

Under the standard set for the in *Strickland v. Washington*, trial counsel's attempt to wait until after the verdict to make a motion for a mistrial or new trial was clearly "deficient below an objective standard of reasonable professional judgment." 466 U.S. at 669. The law is clear that an objection must be made before the verdict to allow the judge an opportunity to cure any inappropriate comments made by the prosecutor.

Moreover, it is very likely that defense counsel's failure to raise the timely objections prejudiced Nelson-Waggoner and denied him his Fifth Amendment rights. This is evident considering that Nelson-Waggoner's conviction was based solely on K.W.'s testimony and the prosecutor's repeated comments regarding Nelson-Waggoner's failure to contradict K.W.'s testimony.

Accordingly, this Court should grant conclude that Nelson-Waggoner was denied his Sixth Amendment right to competent counsel and order that his conviction be reversed and a new trial be held.

WHEREFORE, Petitioner respectfully requests that this enter an order reversing his conviction, together with such other and further relief that the court deems proper.

Dated: ^{March} ~~February~~ ^{CA} __, 2005.

RESPECTFULLY SUBMITTED:



Stacey Nelson-Waggoner 3/4/2005

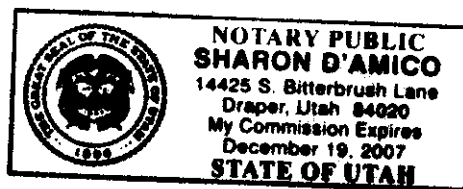
VERIFICATION

I have read the foregoing Petition and I verify that the contents therein are true to the best of my knowledge and belief.

Stacey Nelson-Waggoner 3/4/2005

On ^{written} ~~February~~ ⁰⁴ , 2005, Stacey Nelson-Waggoner personally appeared before me and signed the foregoing Petition for Writ of Habeas Corpus.

Sharon D'Amico
Notary Public



CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service proceedings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Harry Nelson Wilson

(b) County of Residence of First Listed Plaintiff *Self Lake*
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

DEFENDANTS

Tony Ryan, Under. U.S. DISTRICT COURT
County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input checked="" type="checkbox"/> 530 General Habeas Corpus <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

- (Place an "X" in One Box Only)
- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

2254 Federal Habeas

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

NO

DOCKET NUMBER

DATE

3-23-05

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

Judge Dale A. Kimball

DECK TYPE: Civil

DATE STAMP: 05/09/2005 @ 14:18:32

CASE NUMBER: 2:05CV00248 DAK

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SEP 13 2006

FILED

U.S. DISTRICT COURT

OFFICE OF U.S. DISTRICT JUDGE

BRUCE S. JENKINS

2006 SEP 13 P 2:27

Prepared and Submitted By:

Brett P. Johnson (7900)
Troy L. Booher (9419)
Emily V. Smith (10212)
SNELL & WILMER
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Attorneys for Plaintiff The Bank of New York, Trustee

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

THE BANK OF NEW YORK COMPANY, INC.,
TRUSTEE, a New York corporation,

Plaintiff,

vs.

ALEGRA FINANCIAL, L.L.C., a Colorado
limited liability company, and DOES 2 – 10,

Defendants.

ALEGRA FINANCIAL, L.L.C., a Colorado
limited liability company,

Counterclaimant and Third-Party
Plaintiff,

vs.

THE BANK OF NEW YORK COMPANY,
INC., TRUSTEE, a New York corporation, and
DOES I through V,

Counterclaim and Third-Party
Defendants.

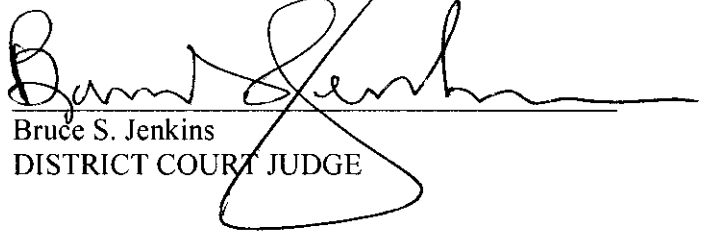
AMENDED SCHEDULING ORDER

Civil No. 2:05cv00401 BSJ

Judge Bruce Jenkins

Pursuant to the *Stipulation and Joint Motion for Amended Scheduling Order* filed by Bank of New York Company, Inc. ("BONY") and Alegra Financial, L.L.C. ("Alegra") and good cause appearing, IT IS HEREBY ORDERED that the Summary Judgment Hearing on Alegra's Motion for Summary Judgment is set for October 30, 2006 at 9:30 am the Pre-Trial Conference is set for November 29, 2006 at 2:30 pm.

DATED this 13 day of September, 2006.


Bruce S. Jenkins
DISTRICT COURT JUDGE

Approved as to Form:

ANDERSON & KARRENBURG

/s/ Heather M. Sneddon
Steven W. Dougherty
Heather M. Sneddon

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2006, I electronically filed the foregoing proposed Amended Scheduling Order with the Clerk of Clerk using the CM/ECF system, which sent notification of such filing to the following:

Steven W. Dougherty
Heather Sneddon
ANDERSON & KARRENBURG
50 W. Broadway, #700
Salt Lake City, UT 84101

/s/ Emily V. Smith

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

OSCAR DE LA MORA, a Mexican citizen,
JOSÉ VILLARREAL, a Mexican citizen, and
SISTEMAS Y TÉCNICAS DE
INFORMACIÓN, S.A. de C.V., a Mexican
corporation, NATURAL HEALTH TRENDS
CORP., a Florida corporation, LEXXUS
INTERNATIONAL INC., a Texas
corporation, LEXXUS INTERNATIONAL
(Mexico), S.A., and DISTRIBUIDORA
NHTC de MEXICO, S. de R.L. de C.V.,

Plaintiff(s),

vs.

NATURE'S SUNSHINE PRODUCTS, INC.,
a Utah corporation, and NATURE'S
SUNSHINE PRODUCTS DE MEXICO, S.A.
de C.V.,

Defendant(s).

ORDER GRANTING MOTION TO
WITHDRAW AS COUNSEL

Case No. 2:05cv00437

Pursuant to DUCivR 83-1.4, the court grants the Ex Parte Motion for Withdrawal of Counsel. David B. Watkiss, Anthony C. Kaye, and Boyd L. Rogers, of Ballard Spahr Andrews & Ingersoll, LLP, may withdraw as counsel for the defendants in this action.

The court, therefore, GRANTS the motion [#25].

DATED this 14th day of September, 2006.

BY THE COURT:

A handwritten signature in black ink, reading "Paul Cassell", is written over a horizontal line.

Paul G. Cassell
United States District Judge

Michael Patrick O'Brien (USB #4894)

Ali Levin (USB #9409)

JONES WALDO HOLBROOK & McDONOUGH PC

Attorneys for Defendant

170 South Main Street, Suite 1500

Salt Lake City, Utah 84101

Telephone: (801) 521-3200

FILED
U.S. DISTRICT COURT

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SEP 14 2006

OFFICE OF U.S. DISTRICT JUDGE
BRUCE S. JENKINS

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

JANINE BAKER,

Plaintiff,

vs.

OVERSTOCK.COM, INC.,

A Utah corporation,

Defendant.

**ORDER GRANTING CONTINUANCE
OF PRETRIAL CONFERENCE**

Case No. 2:05CV00561 BSJ

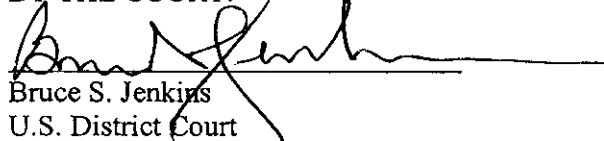
Judge: Bruce S. Jenkins

Defendant Overstock.com, Inc. ("Overstock") and Plaintiff Janine Baker, pursuant to the Stipulated Motion to Continue Pretrial Conference, herewith stipulate, agree, and consent to continue the pretrial conference, currently scheduled for September 29, 2006. For the reasons specified in the Stipulation, and good cause appearing therefor,

IT IS HEREBY ORDERED that the pretrial conference be and hereby is rescheduled to November 29, 2006, at 9:30 a.m.

DATED this 14 day of September, 2006.

BY THE COURT:


Bruce S. Jenkins
U.S. District Court

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2006, I caused a true and correct copy of the foregoing **ORDER GRANTING CONTINUANCE OF PRETRIAL CONFERENCE**, to be filed via electronic filing, to the following:

David J. Holdsworth, Esq.
9125 South Monroe Plaza Way, Suite C
Sandy, Utah 84070

/s/ Karen Richardson

PETER STIRBA (Bar No. 3118)
MEB W. ANDERSON (Bar No. 10227)
STIRBA & ASSOCIATES
215 South State, Suite 750
P.O. Box 810
Salt Lake City, Utah 84110-0810
Telephone: (801) 364-8300

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

LARRY CHIDESTER, *et al.*,

Plaintiff,

v.

UTAH COUNTY, *et al.*

Defendants.

:
:
:
:
:
:
:

**ORDER DENYING IN
PART AND GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT; DENYING
PLAINTIFFS' MOTION TO AMEND**

Civil No: 2:05CV00624

Judge Dee Benson

This matter came on for hearing on August 10, 2006, before the Court pursuant to the Motion for Summary Judgment filed by the Defendants and a Motion to Amend filed by the Plaintiffs. Plaintiffs were represented by their attorney, Stephen Spencer. Defendants were represented by their attorney, Peter Stirba.

At the hearing, the Court denied Plaintiffs' Motion to Amend. This was done after it was recognized by Defendants that they have been sued in their individual capacities as police officers.

FILED
U.S. DISTRICT COURT

2006 SEP 15 A 10:06

CLERK OF COURT

CLERK OF COURT

Regarding Defendants' Motion for Summary Judgment, this matter involves a Utah County Metro S.W.A.T. raid on a drug house in Springville, Utah. The Plaintiffs live in the house which was next door and to the North of the drug house. There is no dispute or issue of fact that during the raid on the drug house a flash bang device detonated at the rear of the drug house was deployed about thirty seconds prior to the front door entry teams actually arriving at the front door of the drug house. It is undisputed that Plaintiffs heard the flash bang device, and that the front door entry teams were still to the North of Plaintiffs' residence, heading towards the drug house, when the flash bang device was detonated at the rear of the drug house. There is no dispute that Larry Chidester was outside the Chidester residence as the front door entry teams were passing the front of the Chidester residence, and that while outside that he was encountered by a police officer, Defendant Jason Parker, who ordered him to the ground and to stay down. Furthermore, there are no disputed facts as to the manner in which Plaintiff Larry Chidester was taken to the ground by Defendant Parker or the manner in which Defendant Taylor entered the Chidester residence.

There is an issue of fact, which prevents summary judgment to Defendants Taylor and Parker, as to whether those officers' reports of seeing a second individual outside the Chidester residence - whom the officers thought may have been fleeing the drug house, - was an accurate report of what they actually saw and perceived which has to form the basis of whether they acted reasonably. In other words, the issue of material fact which precludes summary judgment to

officers Parker and Taylor on both Plaintiffs' excessive force claim, and their unlawful entry claim, is whether the officers' version of events with regards to seeing a second individual was accurate, or whether it was manufactured. It is unclear whether there was any radio communications indicating that anyone was fleeing from the drug house after the flash bang device was deployed. Furthermore, the credibility of the officers should be assessed at trial. Accordingly, the Court denies summary judgment to the individual officers involved in the events at issue, specifically Defendants Deke Taylor and Jason Parker.

The Court grants Defendants' Motion for Summary Judgment as to Utah County and Sgt. Shaun Bufton. There is no evidence sufficient to create an issue of material fact indicating there is an unconstitutional policy or custom of Utah County, and with respect to the allegation of inadequate training, there is an insufficient factual basis to support that allegation. Furthermore, Sgt. Bufton did not participate in the relevant events which form the actual basis for Plaintiffs' claims, *ie.*, he was not specifically involved in the alleged unconstitutional contact with the Plaintiffs.

The Court, having read the parties' memoranda, factual submissions and case law presented in support and opposition to the motions, and having heard argument of counsel, and good cause appearing therefor, **ORDERS** as follows:

1. Plaintiffs' Motion to file an Amended Complaint is **DENIED**;
2. Defendants' Motion for Summary Judgment is **GRANTED** as to Utah County

and Sgt. Shaun Bufton.

3. Defendants' Motion for Summary Judgment is **DENIED** as to individual Defendants Deke Taylor and Jason Parker to the extent the Defendants seeks qualified immunity from Plaintiffs' section 1983 claims of excessive force and unlawful entry. This denial is based on the Court's determination that there is a material issues of genuine fact, which, when viewed in the light most favorable to plaintiffs, preclude this Court from determining as a matter of law that the defendant's conduct was objectively reasonable in light of clearly established law.

The issues of fact which this Court determined were both material and in dispute are as follows:

a. Whether Defendant Parker manufactured the fact that he saw a second individual, other than Larry Chidester outside the Chidester residence, such that ordering Larry Chidester to the ground, approaching Larry Chidester, and subsequently taking Larry Chidester to the ground and briefly detaining him after non-compliance with those orders was excessive force tantamount to a violation of his civil rights under clearly established law;

b. Whether Defendants Taylor manufactured the fact that he saw a second individual outside the Chidester residence, other than Larry Chidester, who he perceived may have fled from the drug house and into the Chidester residence such that entering the Chidester residence to ascertain if such an individual had in fact fled into the Chidester residence was an unlawful entry tantamount to a violation of Plaintiffs' civil rights under clearly established law.

DATED this 3rd day of September, 2006.

BY THE COURT:

A handwritten signature in cursive script that reads "Dee Benson". The signature is written in dark ink and is positioned above a horizontal line.

The Honorable Judge Dee Benson

Approved as to form:

Stephen D. Spencer
Attorney for Plaintiffs

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U.S. DISTRICT COURT

OFFICE OF U.S. DISTRICT JUDGE
BRUCE S. JENKINS

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David C. Bohrer (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
2 Palo Alto Square, 3000 El Camino Real, Suite 700
Palo Alto, CA 94306
Telephone: (650) 843.4000
Facsimile: (650) 843-4001
E-mail address: dbohrer@morganlewis.com

Andrew H. Stone (USB #4921)
JONES WALDO HOLBROOK & McDONOUGH PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200
Facsimile: (801) 328-0537
E-mail Address: astone@joneswaldo.com

Attorneys for Tyco Healthcare Group LP and Tyco
Int'l (US), Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

CLINICAL INNOVATIONS, LLC, dba
CLINICAL INNOVATIONS, INC.,
a Delaware corporation,

Plaintiff &
Counterclaim Defendant,

vs.

TYCO HEALTHCARE GROUP LP, a
Delaware corporation, TYCO
INTERNATIONAL LTD., a Bermuda based
corporation, TYCO INTERNATIONAL (US),
INC., a Massachusetts corporation,

Defendants &
Counterclaimant.

**[PROPOSED] ORDER GRANTING
MOTION FOR LEAVE TO FILE
OVERLENGTH MEMORANDUM**

Case No. 2:05CV00633 BSJ (consolidated with
Case No. 2:05CV0006 DAK)

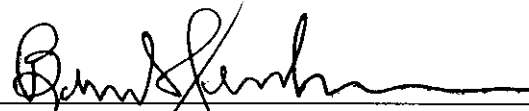
Honorable Bruce S. Jenkins

This matter comes before the Court on the Motion for Leave to file an Overlength Memorandum in Support of Reply in Support of Motion for Summary Judgment of Non-Infringement of Defendants Tyco Healthcare Group LP and Tyco International (US), Inc. (collectively "Tyco"). The Court being fully advised and finding good cause therefore, it is

ORDERED that Tyco's Motion for Leave to file an Overlength Memorandum in Support of its Reply in Support of Motion for Summary Judgment of Non-Infringement is hereby GRANTED.

Dated the 13 day of Sept, 2006.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Bruce S. Jenkins", written over a horizontal line.

Honorable Bruce S. Jenkins
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/David C. Bohrer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

ELAINE CHAO,
SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

KORY THURSTON and the MARKETING
SOLUTIONS INTERNATIONAL, INC., 401(K)
PLAN,

Defendants.

ORDER

CASE NO.:
2:05-CV-00828-BSJ

RECEIVED

FILED
U.S. DISTRICT COURT
SEP 14 2006

2006 SEP 15 A 10:46
OFFICE OF U.S. DISTRICT JUDGE
BRUCE S. JENKINS

ORDER

ORDER

Plaintiff having filed a Motion to Extend the
Discovery Deadlines in the instant matter and it being
represented that Defendants have no objection to and
concurs with the granting of the same and good cause
existing, now therefore it is:

ORDERED that the time for the parties filing their
Final Pre-Trial Order is extended to and including October
18, 2006. The Final Pretrial Conference is set for November 2, 2006,
at 10:30 a.m.


BRUCE S. JENKINS
Senior U.S. District Court Judge

Dated: 9/14/06

SEP 13 2000

FILED
U.S. DISTRICT COURT

U.S. DISTRICT COURT

2006 SEP 14 P 1:37

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

RAMADA WORLDWIDE INC., F/K/A,
RAMADA FRANCHISE SYSTEMS, INC.,

Plaintiff,

V.

GLEN A. OVERTON,

Defendants.

*
*
* CASE NO. 2:05CV00937 DB
*
*
*
*
*
* Appearing on behalf of:
*
* RAMADA WORLDWIDE INC.
*
*
*
*

MOTION AND CONSENT OF DESIGNATED ASSOCIATE LOCAL COUNSEL

I, Thomas R. Barton 6827), hereby move the pro hac vice admission of petitioner to practice in this Court. I hereby agree to serve as designated local counsel for the subject case; to readily communicate with opposing counsel and the Court regarding the conduct of this case; and to accept papers when served and recognize my responsibility and full authority to act for and on behalf of the client in all case-related proceedings, including hearings, pretrial conferences, and trials, should Petitioner fail to respond to any Court order.

Date: September 13, 2006.

(Signature of Local Counsel)

6827
(Utah Bar Number)

APPLICATION FOR ADMISSION PRO HAC VICE

Petitioner, David A. Jermann, hereby requests permission to appear pro hac vice in the subject case. Petitioner states under penalty of perjury that he/she is a member in good standing of the bar of the highest court of a state or the District of Columbia; is (i) ☒ a non-resident of the State of Utah or, (ii) ☐ a new resident who has applied for admission to the Utah State Bar and will take the bar examination at the next scheduled date; and, under DUCivR 83-1.1(d), has associated local counsel in this case. Petitioner's address, office telephone, the courts to which admitted, and the respective dates of admission are provided as required.

Petitioner designates Thomas R. Barton (6827) as associate local counsel.

Date: September 12 2006.

Check here _____ if petitioner is lead counsel.

(Signature of Petitioner)

Name of Petitioner: David A. Jermann

Office Telephone: (816) 221-3420
(Area Code and Main Office Number)

Business Address: Armstrong Teasdale LLP

(Firm/Business Name)

2345 Grand Boulevard, Suite 2000 Kansas City, Missouri 64108-2617

Street

City

State

Zip

BAR ADMISSION HISTORY

COURTS TO WHICH ADMITTED

LOCATION

DATE OF ADMISSION

U.S. District Court, Western District of Missouri, October 1999

State Courts of Missouri, October 1999

U.S. District Court, District of Kansas, 2000

State Courts of Kansas, 2000

(If additional space is needed, attach separate sheet.)

PRIOR PRO HAC VICE ADMISSIONS IN THIS DISTRICT

CASE TITLE

CASE NUMBER

DATE OF ADMISSION

Century 21 Real Estate, LLC v. Castleland Realty, Inc., 2:06cv381-PGC

05/10/06

(If additional space is needed, attach a separate sheet.)

ORDER OF ADMISSION

FEE PAID

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for Petitioner's admission pro hac vice in the United States District Court, District of Utah in the subject case is GRANTED.

This 13 day of Sept, 20 06.

Dee Benson

U.S. District Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

ELECTRONIC CASE FILING REGISTRATION FORM

Attorneys who are active or current pro hac vice members of the District of Utah's Bar may register for the District of Utah Electronic Filing System by (i) completing the required training and (ii) signing and returning this form to the Court. Please review carefully the registration conditions set forth below before signing.

<u>David</u> Name - First	<u>A.</u> Middle	<u>Jermann</u> Last	<u>Armstrong Teasdale LLP</u> Firm Name
<u>2345 Grand Boulevard, Suite 2000</u> Mailing Address			<u>Kansas City, MO 64108</u> City, State, Zip
<u>Utah State Bar # (if applicable)</u>			<u>816-221-3420</u> Telephone Number

By signing this form, I understand and consent to the following:

- Pursuant to Fed. R. Civ. P. 5(b)(2)(D), I will receive all items required to be served under Fed.R.Civ.P. 5(a) and 77 (d) and Fed. R. Crim P. 49 by either (i) notice of electronic filing, or (ii) e-mail transmission;
- Such electronic service will constitute service and notice of entry as required by those rules;
- I waive my right to service by USPS mail;
- I will abide by all Court rules, orders, and procedures governing the use of the electronic filing system;
- The combination of user ID and password issued by this Court will serve as the equivalent of my signature when I file documents using the District of Utah's electronic filing system;
- I will carefully examine all documents prior to filing them electronically with this Court to either (i) redact sensitive and private information pursuant to DUCiv R , or (ii) move that the filing be sealed;
- I will secure and protect my Court-issued password against unauthorized use or compromise; and
- I will notify the Clerk of this Court within 24 hours when I (i) have a change of name, firm, address, or e-mail address to ensure proper and timely service, or (ii) learn that my password has been compromised.

Email Address(es):

Primary E-mail address djermann@armstrongteasdale.com

Up to two additional e-mail addresses 1) cfrakes@armstrongteasdale.com,

2) _____

Notice Method: ☒ Separate Notice for each filing (1 email for each filing made) (default)
(check one) ☐ Daily Summary Report (1 email notification showing summary of all daily filings)

To receive a login, you must complete one of these four options. Please check appropriate box.

<input type="checkbox"/> I have attended the CMECF Training for Attorneys given by the Court.
<input type="checkbox"/> I have completed the CMECF Training for Attorneys given by an in-house trainer in my firm.
<input type="checkbox"/> I have completed the CMECF Online Computer-Based Training modules on the court website.
<input checked="" type="checkbox"/> I have an ECF account in the Utah Bankruptcy Court or in another Federal District Court. District: _____

Date: September 12, 2006

Signature: 

Please mail this completed form to: **United States District Court, Office of the Clerk, ATTN: CM/ECF Registration, 350 S. Main St., Suite 150, Salt Lake City, Utah 84101**

After this Court processes this form, you will receive by email or US Mail your user ID and password that will enable you to access the system. The User Guide and administrative procedures for system use may be downloaded at: <http://www.utd.uscourts.gov/cmecf/documents/ecfpage.html>. Please call the Clerk's Office Help Desk at (801) 524-3248 if you have questions concerning registration, training, or use of the electronic filing system.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
Central Division for the District of Utah

Orbit Medical and Robert Gallup,

Plaintiff,

vs.

Dennis Kline, et al,

Defendant.

SCHEDULING ORDER

Case No. 2:05CV1028TC

District Judge Tena Campbell

Magistrate Judge Brooke C. Wells

Pursuant to Fed. R. Civ. P. 16(b), the Magistrate Judge¹ received the Attorneys' Planning Report filed by counsel. The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

****ALL TIMES 4:30 PM UNLESS INDICATED****

- | | | |
|-----------|---|----------------------|
| 1. | PRELIMINARY MATTERS | <u>DATE</u> |
| | Nature of claim(s) and any affirmative defenses: | |
| | a. Was Rule 26(f)(1) Conference held? | <u>Yes</u> |
| | b. Has Attorney Planning Meeting Form been submitted? | <u>Yes</u> |
| | c. Was 26(a)(1) initial disclosure completed? | <u>9/13/06</u> |
|
 | | |
| 2. | DISCOVERY LIMITATIONS | <u>NUMBER</u> |
| | a. Maximum Number of Depositions by Plaintiff(s) | <u>25</u> |
| | b. Maximum Number of Depositions by Defendant(s) | <u>25</u> |
| | c. Maximum Number of Hours for Each Deposition
(unless extended by agreement of parties) | <u>7</u> |
| | d. Maximum Interrogatories by any Party to any Party | <u>25</u> |
| | e. Maximum requests for admissions by any Party to any Party | |
| | f. Maximum requests for production by any Party to any Party | |

	<u>DATE</u>
3. AMENDMENT OF PLEADINGS/ADDING PARTIES²	
a. Last Day to File Motion to Amend Pleadings	<u>2/1/07</u>
b. Last Day to File Motion to Add Parties	<u>2/1/07</u>
4. RULE 26(a)(2) REPORTS FROM EXPERTS³	
a. Plaintiff	<u>3/1/07</u>
b. Defendant	<u>3/1/07</u>
c. Counter Reports	
5. OTHER DEADLINES	
a. Discovery to be completed by:	
Fact discovery	<u>1/31/07</u>
Expert discovery	<u>4/16/07</u>
b. (optional) Final date for supplementation of disclosures and discovery under Rule 26 (e)	
c. Deadline for filing dispositive or potentially dispositive motions	<u>4/2/07</u>
6. SETTLEMENT/ ALTERNATIVE DISPUTE RESOLUTION	
a. Referral to Court-Annexed Mediation	
b. Referral to Court-Annexed Arbitration	
c. Evaluate case for Settlement/ADR on	
d. Settlement probability:	
7. TRIAL AND PREPARATION FOR TRIAL:	
a. Rule 26(a)(3) Pretrial Disclosures⁴	
Plaintiffs	7/17/07
Defendants	7/31/07
b. Objections to Rule 26(a)(3) Disclosures (if different than 14 days provided in Rule)	

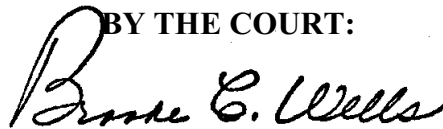
			<u>DATE</u>
c.	Special Attorney Conference ⁵ on or before		8/14/07
d.	Settlement Conference ⁶ on or before		
e.	Final Pretrial Conference	3:00 pm	8/27/07
f.	Trial	<u>Length</u>	<u>Time</u> <u>Date</u>
	i. Bench Trial		
	ii. Jury Trial	<u>10</u>	<u>8:30 am</u> <u>9/17/07</u>

8. OTHER MATTERS:

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

Dated this 15 day of September, 2006.

BY THE COURT:



**Brooke C. Wells
U.S. Magistrate Judge**

1. The Magistrate Judge completed Initial Pretrial Scheduling under DUCivR 16-1(b) and DUCivR 72-2(a)(5). The name of the Magistrate Judge who completed this order should NOT appear on the caption of future pleadings, unless the case is separately referred to that Magistrate Judge. A separate order may refer this case to a Magistrate Judge under DUCivR 72-2 (b) and 28 USC 636 (b)(1)(A) or DUCivR 72-2 (c) and 28 USC 636 (b)(1)(B). The name of any Magistrate Judge to whom the matter is referred under DUCivR 72-2 (b) or (c) should appear on the caption as required under DUCivR10-1(a).
2. Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).
3. A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.
4. Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.
5. The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special

equipment or courtroom arrangement requirements will be included in the pre-trial order.

6. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

S:\IPT\2006\Orbit Medical v Dennis Kline et al 2 05 CV 1028 TC alp.wpd

UNITED STATES DISTRICT COURT

Central

District of

FILED
DISTRICT COURT
Utah

UNITED STATES OF AMERICA

V.

Juventino Corona-Perez

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX206CR000051-001

USM Number: 13265-081

Nyal Bodily

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1, 2 and 7 of the Indictment.

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §1546(a) and	Visa Fraud/Aiding and Abetting		1s
18 U.S.C. §2			
18 U.S.C. §1028A	Aggravated Identity Theft		2 and 7

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 3-6, 8-13, 19 and 20 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/11/2006

Date of Imposition of Judgment

Signature of Judge

Dale A. Kimball

Name of Judge

U.S. District Judge

Title of Judge

Date

September 14, 2006

DEFENDANT: Juventino Corona-Perez
CASE NUMBER: DUTX206CR000051-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

24 months as to count 1; 24 months as to counts 2 and 7, to run consecutively for a total of 48 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated in a facility in California to facilitate family visitation.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Juventino Corona-Perez
CASE NUMBER: DUTX206CR000051-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

36 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Juventino Corona-Perez

CASE NUMBER: DUTX206CR000051-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not illegally reenter the United States. If the defendant returns to the United States during the period of supervision, he/she is instructed to contact the United States Probation Office in the District of Utah within 72 hours of arrival in the United States.

CRIMINAL MONETARY PENALTIES

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Juventino Corona-Perez
CASE NUMBER: DUTX206CR000051-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 300.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
See attached Final Judgment of Forfeiture

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES OF AMERICA, :
 :
 Plaintiff, : Case #: 2:06CR00051 DAK
 :
 vs. : JUDGMENT OF FORFEITURE
 :
 JUVENTINO CORONA-PEREZ, :
 : JUDGE Dale A. Kimball
 Defendant. :
 :
 :

1. As a result of a plea of guilty to Counts 1, 2 and 7 of the Indictment for which the government sought forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C), the defendant Juventino Corona-Perez shall forfeit to the United States all property, real or personal, that is derived from, used, or intended to be used in violations of 18 U.S.C. § 1546(a), 18 U.S.C. § 2, 18 U.S.C. §§ 1028 (a), (f), and 1028A, and 8 U.S.C. § 1326, including but not limited to:

- Page 1 of 3

2. The Court has determined that based on a guilty plea of Fraud and Misuse of a Visa, and Aiding and Abetting, that the above-named property is subject to forfeiture as facilitating property of the above-named offenses, that the defendant had an interest in the property, and that the government has established the requisite nexus between such property and such offense.

IT IS FURTHER ORDERED:

3. Pursuant to Fed. R. Crim. P. 32.2(b)(3), the Preliminary Order of Forfeiture is made final as to the defendant and the Judgment of Forfeiture shall be made part of the sentence and included in the judgment.

4. Any petition filed by a third party asserting an interest in the subject property shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's acquisition of the right, title, or interest in the subject property, any additional facts supporting the petitioners claim and relief sought.


5. After the disposition of any motion filed under Fed. R. Crim. P. 32.2(c)(1)(A) and before a hearing on the petition, discovery may be conducted in accordance with the Federal Rules of Criminal Procedure upon a showing that such discovery is necessary or desirable to resolve factual issues.

6. The United States shall have clear title to the subject property following the Court's disposition of all third party interests, or, if none, following the expiration of the period provided in 21 U.S.C. § 853 which is incorporated by 18 U.S.C. § 982(b) for the filing of third party petitions.

7. The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to Fed. R. Crim. P. 32.2(e).

Dated this 11th day of September, 2006.

BY THE COURT:


DALE A. KIMBALL, Judge
United States District Court

Pages 10 - 13

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, :

Plaintiff, : Case #: 2:06CR00051 DAK

vs. : JUDGMENT OF FORFEITURE

JUVENTINO CORONA-PEREZ, :

Defendant. : JUDGE Dale A. Kimball

:

IT IS HEREBY ORDERED that:

1. As a result of a plea of guilty to Counts 1, 2 and 7 of the Indictment for which the government sought forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C), the defendant Juventino Corona-Perez shall forfeit to the United States all property, real or personal, that is derived from, used, or intended to be used in violations of 18 U.S.C. § 1546(a), 18 U.S.C. § 2, 18 U.S.C. §§ 1028 (a), (f), and 1028A, and 8 U.S.C. § 1326, including but not limited to:

- 1998 Ford Mustang, VIN 1FAFP4044WF129161
- Toshiba Laptop T4700CS, s/n 06432962
- NHP ScanJet 367, s/n CN39AS2R9N
- Lexsmart 265 Color ink jet Printer
- GBC Heat Seal H200, s/n RB06848X

2. The Court has determined that based on a guilty plea of Fraud and Misuse of a Visa, and Aiding and Abetting, that the above-named property is subject to forfeiture as facilitating property of the above-named offenses, that the defendant had an interest in the property, and that the government has established the requisite nexus between such property and such offense.

IT IS FURTHER ORDERED:

3. Pursuant to Fed. R. Crim. P. 32.2(b)(3), the Preliminary Order of Forfeiture is made final as to the defendant and the Judgment of Forfeiture shall be made part of the sentence and included in the judgment.

4. Any petition filed by a third party asserting an interest in the subject property shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's acquisition of the right, title, or interest in the subject property, any additional facts supporting the petitioners claim and relief sought.

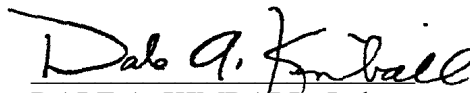
5. After the disposition of any motion filed under Fed. R. Crim. P. 32.2(c)(1)(A) and before a hearing on the petition, discovery may be conducted in accordance with the Federal Rules of Criminal Procedure upon a showing that such discovery is necessary or desirable to resolve factual issues.

6. The United States shall have clear title to the subject property following the Court's disposition of all third party interests, or, if none, following the expiration of the period provided in 21 U.S.C. § 853 which is incorporated by 18 U.S.C. § 982(b) for the filing of third party petitions.

7. The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to Fed. R. Crim. P. 32.2(e).

Dated this 15th day of September, 2006.

BY THE COURT:

A handwritten signature in black ink, reading "Dale A. Kimball". The signature is written in a cursive, flowing style with a horizontal line underneath the name.

DALE A. KIMBALL, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

JUVENTINO CORONA-PEREZ,

Defendant.

CASE: 2:06CR00051 DAK

FINAL ORDER OF FORFEITURE

JUDGE: Dale A. Kimball

WHEREAS, on June 20, 2006, this Court entered a Preliminary Order of Forfeiture, ordering the defendant to forfeit:

- 1998 Ford Mustang, VIN 1FAFP4044WF129161
- Toshiba Laptop T4700CS, s/n 06432962
- NHP ScanJet 367, s/n CN39AS2R9N
- Lexsmart 265 Color ink jet Printer
- GBC Heat Seal H200, s/n RB06848X

WHEREAS, the United States caused to be published in *The Salt Lake Tribune*, a newspaper of general circulation, notice of this forfeiture and of the intent of the United States to dispose of the property in accordance with the law and as specified in the Preliminary Order, and further notifying all third parties of their right to petition the Court within thirty (30) days for a hearing to adjudicate the validity of their alleged legal interest in the property; and

WHEREAS, notice was served upon Juventino Corona-Perez; and

WHEREAS, no timely petition has been filed; and

WHEREAS, the Court finds that defendant(s) had an interest in the property that is subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C);

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

- 1998 Ford Mustang, VIN 1FAFP4044WF129161
- Toshiba Laptop T4700CS, s/n 06432962
- NHP ScanJet 367, s/n CN39AS2R9N
- Lexsmart 265 Color ink jet Printer
- GBC Heat Seal H200, s/n RB06848X


are hereby forfeited to the United States of America pursuant to 18 U.S.C. § 981(a)(1)(C).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all right, title and interest to the property described above is hereby condemned, forfeited and vested in the United States of America, and shall be disposed of according to law; and

IT IS FURTHER ORDERED that the United States District Court shall retain jurisdiction in the case for the purpose of enforcing this Order

SO ORDERED; Dated this 15th day of September, 2006.

BY THE COURT:


DALE A. KIMBALL, Judge
United States District Court

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

LINDA CARSON,

Defendant.

ORDER CONTINUING SENTENCING

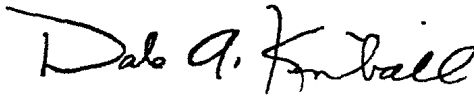
Case No. 2:06CR00065DAK

Based on the motion filed by the defendant and good cause appearing;

IT IS HEREBY ORDERED that Sentencing set for September 26, 2006, is hereby continued until December 4, 2006 at the hour of 2:30 p.m .

DATED this 15th day of September, 2006.

BY THE COURT:



DALE A. KIMBALL

United States District Court Judge

UNITED STATES DISTRICT COURT

Central Division

District of

Utah

UNITED STATES OF AMERICA

V.

Rick Justin Sill

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX206CR000105-001

USM Number: 13512-081

Jamie Zenger, FPD

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of indictment

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC Sec. 922(g)(1)	Felon in Possession of a Firearm		1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) II ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/11/2006

Date of Imposition of Judgment

Signature of Judge

Ted Stewart

Name of Judge

U.S. District Judge

Title of Judge

Date

9/13/06

DEFENDANT: Rick Justin Sill
CASE NUMBER: DUTX206CR000105-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

30 months

☒ The court makes the following recommendations to the Bureau of Prisons:

The court strongly recommends defendant participate in drug treatment and counseling while incarcerated, as well as educational opportunities including computer training. The court further recommends defendant be placed in a facility in Mariana or Pensacola, Florida.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Rick Justin Sill
CASE NUMBER: DUTX206CR000105-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

24 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Rick Justin Sill
CASE NUMBER: DUTX206CR000105-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant will submit to drug/alcohol testing as directed by the probation office, and pay a one-time \$115 fee to partially defer the costs of collection and testing.
2. The defendant shall participate in drug and/or alcohol abuse treatment under a co-payment plan as directed by the USPO and shall not possess or consume alcohol during the course of treatment, nor frequent businesses where alcohol is the chief item of order.
3. The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the USPO at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: Rick Justin Sill
CASE NUMBER: DUTX206CR000105-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>
--------	----------------	----------------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Rick Justin Sill
CASE NUMBER: DUTX206CR000105-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
Special Assessment Fee of \$100 is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

Central Division

District of

Utah

UNITED STATES OF AMERICA

V.

Jaren Alfredo Gonzalez

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX206cr000271-001

USM Number: 13557-081

Thomas V. Rasmussen

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC Sec. 875(c)	Transmitting Threatening Communications		1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/12/2006

Date of Imposition of Judgment

Signature of Judge

Hon. Ted Stewart

Name of Judge

U. S. District Judge

Title of Judge

9/14/06

Date

DEFENDANT: Jaren Alfredo Gonzalez
CASE NUMBER: DUTX206cr000271-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Jaren Alfredo Gonzalez
CASE NUMBER: DUTX206cr000271-001

PROBATION

The defendant is hereby sentenced to probation for a term of :

18 months.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Jaren Alfredo Gonzalez
CASE NUMBER: DUTX206cr000271-001

ADDITIONAL PROBATION TERMS

1. The defendant will submit to drug testing as directed by the probation office, and pay a one-time \$115 fee to partially defray the costs of collection and testing. If testing reveals illegal drug use or excessive and/or illegal consumption of alcohol such as alcohol-related criminal or traffic offenses, the defendant shall participate in drug and/or alcohol abuse treatment under a co-payment plan as directed by the probation office and shall not possess or consume alcohol during the course of treatment, nor frequent businesses where alcohol is the chief item of order.
2. The defendant shall refrain from associating, directly or via the computer, with persons who have a criminal records or persons engaged in criminal activity.

DEFENDANT: Jaren Alfredo Gonzalez
CASE NUMBER: DUTX206cr000271-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 500.00	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ <u> 0.00</u>	\$ <u> 0.00</u>
---------------	--------------------------	--------------------------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Jaren Alfredo Gonzalez
CASE NUMBER: DUTX206cr000271-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☐ Lump sum payment of \$ 600.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
- Special Assessment Fee of \$100 is due immediately. Fine of \$500 is due immediately and is payable at the minimum rate of \$25.00 per month.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

1.
FILED
U.S. DISTRICT COURT
PROB 35

(Rev. 7/97)

2006 SEP 15 A 10:06

**Report and Order Terminating Supervised Release
Prior to Original Expiration Date**

U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

U.S. DISTRICT COURT

for the

DISTRICT OF UTAH

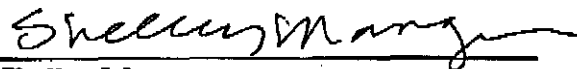
UNITED STATES OF AMERICA

v. Criminal No. 2:06-CR-00380-001-DB

ANDREW BRETT WOLFLEY

On November 15, 2001, the above-named was placed on supervised release for a period of five years. The defendant has complied with the rules and regulations of supervised release and is no longer in need of supervision. It is accordingly recommended that the defendant be discharged from supervision.

Respectfully submitted,



Shelley Mangum
United States Probation Officer

Pursuant to the above report, it is ordered that the defendant be discharged from supervision and that the proceedings in the case be terminated.

Dated this 14th day of September, 2006.



Honorable Dee V. Benson
Chief United States District Judge

UNITED STATES DISTRICT COURT

Central Division

District of

Utah

UNITED STATES OF AMERICA

V.

Jose Medina-Gutierrez

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX206CR000404-001

USM Number: 13680-081

Viviana Ramirez, FPD

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8 USC Sec 1326	Re-entry of Previously Removed Alien		1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/11/2006

Date of Imposition of Judgment

Signature of Judge

Ted Stewart

Name of Judge

U.S. District Judge

Title of Judge

Date

9/14/06

DEFENDANT: Jose Medina-Gutierrez
CASE NUMBER: DUTX206CR000404-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

time served.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Jose Medina-Gutierrez
CASE NUMBER: DUTX206CR000404-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

12 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Jose Medina-Gutierrez
CASE NUMBER: DUTX206CR000404-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not illegally re-enter the United States. If the defendant returns to the United States during the period of supervision, he is instructed to contact the United States Probation Office in the District of Utah within 72 hours of arrival in the United States.

DEFENDANT: Jose Medina-Gutierrez
CASE NUMBER: DUTX206CR000404-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ 0.00	\$ 0.00	

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Jose Medina-Gutierrez
CASE NUMBER: DUTX206CR000404-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
Special Assessment Fee of \$100 is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH CENTRAL DIVISION

USA <div style="text-align:right">Plaintiff,</div> <div style="text-align:center">vs.</div> Rodney Liti <div style="text-align:right">Defendant.</div>	Order Directing Briefing in Advance of Motion Hearing <div style="text-align:center">and</div> NOTICE OF HEARING Case No. 2:06-cr-00487-PGC
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Counsel for the United States is **directed to file, ten days in advance of the motion to suppress hearing set for 10/02/2006 at 10:30 a.m.**, a statement of facts that it anticipates will emerge at the hearing, and cases supporting admission of the challenged evidence. This filing shall contain, at least, a chronology of events sufficient to permit defense counsel and the Court to prepare in advance for the factual and legal issues that are likely to emerge at the hearing. Any videotape or audiotape which the government anticipates will be admitted at the hearing shall also be submitted in advance, with notice to opposing counsel and to the court as to the salient portions of the tape. Counsel for both sides shall meet and confer before the hearing in an effort to narrow the disputed issues and avoid the summoning of unnecessary witnesses.


Counsel for the defendant may file a response to the filing of the United States two days in advance of the hearing. If the defendant's pleading is filed less than five days before the hearing, the defendant shall hand deliver or fax the pleading to the government and to the court.

Counsel are advised that the Court may, in its discretion, after hearing argument from counsel, rule from the bench concerning the challenged evidence, if the Court is sufficiently well advised of the facts and the law. Counsel on either side may request an opportunity to submit post-hearing, supplemental briefing on an expedited schedule on unanticipated issues that arose during the hearing.

By directing this briefing schedule, the Court hopes to facilitate rapid decision on suppression issues. The Court invites feedback from counsel on the desirability of these procedures.

SO ORDERED.

DATED this 14th day of September



Paul G. Cassell
United States District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SHAUN L. CHRISTENSEN,
Plaintiff,

vs.

PARK CITY MUNICIPAL CORP., a
governmental entity; SHAUNA STOKES,
Park City Code Enforcement Officer;
RON KING, Park City Police Officer; and
WAYNE YOUNG, Park City Police
Officer,
Defendants.

MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE ERRATA &
PORTION OF REPLY MEMO AND
GRANTING DEFENDANTS'
MOTION TO DISMISS

Case No. 2:06-CV-202 TS

Qualified immunity shields government officials from civil damages suits for violations of civil rights if their conduct does not violate clearly established constitutional rights of which a reasonable official would have known. Defendants assert qualified immunity against Plaintiff's claims that their enforcement of city ordinances prohibiting selling their artwork outdoors on city property without a license violated his constitutional

rights. Because the rights that Plaintiff relies upon were not clearly established at the time of Plaintiff's arrest, Defendants are entitled to qualified immunity.

Plaintiff alleges as follows: He is a visual artist. On January 17, 2005, he was displaying and selling his art work in a city park located in Park City, Utah. He was arrested by Defendants King and Young for conducting business without a business license and conducting business not in an enclosed building in violation of Park City Ordinances § 4-2-1 and § 4-3-2 (the Ordinances). He was incarcerated and charged, but the charges were later dropped. The Ordinances contain an exception for civic groups such as the Girl Scouts.¹ He claims that the Defendants' conduct violated his rights under the Utah and United States constitutions by interfering with his First Amendment right to Freedom of Expression, his rights under the Equal Protection Clause, and right to be free of unreasonable seizure. Pursuant to 42 U.S.C. § 1983, he seeks monetary and declaratory relief under the United States Constitution and seeks declaratory relief under the Utah Constitution.

Defendants contend that the Ordinances are content neutral restrictions on the time and manner of street vending. Defendants move to dismiss for the failure to state a claim on the following grounds: One, that qualified immunity applies because Plaintiff does not allege a violation of a clearly established constitutional right. Two, that Plaintiff cannot sue the individual defendants in their official capacities. Three, that he fails to state a claim against the individual Defendants because he fails to allege facts sufficient to show a

¹Former Park City Ord. § 4-3-16. This ordinance was not specifically cited in the Complaint.

violation of his constitutional rights of freedom of expression, equal protection, and unreasonable seizure. Four, that he fails to state a claim against defendant Stokes because he does not allege Stokes' personal participation in the events. Five, that he fails to state a claim for municipal liability because he does not allege a municipal policy or custom.

Plaintiff contends that his Complaint states a claim for constitutional violations because he claims that the Ordinances as applied denied a street artist access to public sidewalk and park while allowing others access to the same locations to sell their wares. He contends that qualified immunity does not apply because a First Amendment right of street artists has been clearly established for some time. He contends that his claims are properly brought against the individual Defendants in their official as well as personal capacities, that Defendant Stokes personally initiated the action and that the individual Defendants acted under a municipal policy.

Defendants raise their qualified immunity challenge under Rule 12(b)(6).²

Asserting a qualified immunity defense via a Rule 12(b)(6) motion, . . . , subjects the defendant to a more challenging standard of review than would apply on summary judgment. We accept all well-pleaded allegations of the complaint as true and consider them in the light most favorable to the nonmoving party. Further, we will not dismiss a complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

“Our threshold inquiry in the qualified immunity analysis is whether, taking plaintiff's allegations as true, [defendants] violated [his constitutional right.] If we conclude that [plaintiff has] alleged constitutionally impermissible conduct, [the officers] may nevertheless be shielded from liability for civil

²Fed R.Civ P.

damages if [their] actions did not violate clearly established . . . constitutional rights of which a reasonable person would have known.’³

As a preliminary matter, this case involves an ordinance that was applicable in January 2004. Since then the Ordinances have been repealed and replaced. Defendants filed an Errata which attached the current Ordinance. Plaintiff moves to strike the Errata and the portions of Defendants’ Reply brief that refer to the current Ordinances because he seeks no relief regarding the current Ordinances.

As the parties’ arguments regarding the Errata have now been made clear, this present action involves only the Ordinances in place in January 2004. The record clearly reflecting the applicable Ordinances are those former Ordinances in effect in 2004, the Court will deny the Motion to Strike Errata & Portions of the Reply Brief.

Turning to the threshold question, the Court finds that viewing all of the allegations in the Complaint as true for the purposes of this motion, that the Plaintiff has not made an initial showing of a violation of his First Amendment rights by alleging that he was arrested for engaging in expressive activity protected by the First Amendment and the free expression provision of the Utah Constitution because his allegations do not identify the material at issue. The Second Circuit has held that some types of visual art – paintings, photographs, prints, and sculptures – are presumptively expressive and therefore are

³*Walker v. City of Orem*, 451 F.3d 1139, 1145 (10th Cir. 2006) (quoting *Jones v. Hunt*, 410 F.3d 1221, 125 (10th Cir. 2005) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002))).

protected under the First Amendment.⁴ However, since *Bery*, the application of its holding has been dependent upon the specific nature of the material.

In considering whether Plaintiff has alleged facts showing a violation of a constitutional right, this Court agrees with those courts holding that specific goods described as art work are entitled to First Amendment protection if they are protected expression under the First Amendment.⁵ For example in *Mastrovincenzo*,⁶ the Second Circuit construed its earlier *Bery* case as holding that some visual arts—paintings, photographs, prints and sculptures—automatically trigger First Amendment review. But it adopted a dominant purpose test for determining whether other forms of goods designated as art are entitled to First Amendment protection.⁷

In *Celli v. City of St. Augustine*,⁸ the trial court expressly declined to reach as far as the *Bery* case's broad holding regarding visual arts as protected under the First Amendment.⁹ Instead, the *Celli* court found that the specific visual art at issue in that case was protected under the First Amendment because it clearly incorporated written

⁴*Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996).

⁵*Mastrovincenzo v. City of New York*, 435 F.3d 78, 94-96 (2nd Cir. 2006).

⁶435 F.3d at 94-96

⁷*Id.*

⁸214 F.Supp.2d 1255 (M.D. Fla. 2000).

⁹*Id.* at 1258.

expression such as phrases and poems that were political parody or statement protected under the First Amendment.¹⁰

In *White v. City of Spark*,¹¹ like *Celli*, a trial court declined to adopt the broad *Bery* holding that certain forms of visual art were inherently expressive and entitled to First Amendment protection without individualized inquiry into expressiveness.¹²

While plaintiff would have this court adopt the *Bery* holding and find that all paintings, photographs, prints and sculptures are inherently expressive, thereby eliminating the need for any individualized inquiry into the expressiveness of a particular piece of art or a particular type of artwork, the court declines this invitation. Applying such a blanket presumption of protected status would not only be unnecessary to resolve the motion before the court, but would also be out of step with Ninth Circuit precedent and the First Amendment's fundamental purpose-to protect *expression*.¹³

Upon such individualized inquiry, the *White* court found that the specific artwork at issue therein was a political, religious, philosophical, or ideological message that merited First Amendment protection.¹⁴

This Court need not determine the exact parameters of the First Amendment protection for sale of expressive art work because of the vagueness of Plaintiff's allegations. Under those allegations, the Court could only find a constitutional violation if it determined that the sale of any good designated by the seller as art work is entitled to

¹⁰*Id.* at 1258-59.

¹¹341 F.Supp.2d 1129 (D. Nev. 2004).

¹²*Id.* at 1139.

¹³*Id.* at 1138 -39.

¹⁴*Id.*

First Amendment protection. Such an interpretation would exceed that adopted by any other court because *Bary* limited the presumptively expressive status of artwork to four specific categories of art, and Plaintiff's allegations are too vague to even place his artwork within one of those four categories. In considering this Motion to Dismiss, the Court considers only the allegations of the Complaint, which merely allege that the goods he was selling are "art" and "art work." By itself, this is insufficient to show that their sale is protected activity under the First Amendment. Accordingly, the Court need not address Defendants' argument that the former Ordinances are valid time, place, and manner restrictions on protected speech.

Taking all of Plaintiff's allegations as true, the Complaint must be dismissed if Plaintiff does not allege a constitutional violation.¹⁵ Where the Court finds that Plaintiff has not met the first part of the qualified immunity analysis, "there is no necessity for further inquiries concerning qualified immunity."¹⁶

Plaintiff seeks leave to amend the Complaint if the Court finds merit in the Motion to Dismiss. He does not specify the proposed amendments. Defendants oppose granting leave to amend on the grounds that it would be futile.

Leave to amend a party's complaint "shall be freely given when justice so requires."¹⁷ Tenth Circuit case law "establishes a limitation to this principle: the district

¹⁵*Lawrence v. Reed*, 406 F.3d 1224, 1230 (10th Cir. 2005).

¹⁶*Saucier v. Katz*, 533 U.S. 194, 201 (2001).

¹⁷Fed.R.Civ.P. 15(a).

court may dismiss without granting leave to amend when it would be futile to allow the plaintiff an opportunity to amend his complaint.”¹⁸

The Court finds that leave to amend would be futile for the Defendants sued in their individual capacities because the Court finds that the case law relied upon by Plaintiff was not “clearly established” in January 2004. As noted above, the Court ordinarily need not address the second part of qualified immunity analysis where it has not found the Complaint alleges a constitutional violation. But in this case it is necessary in order to address the issue of futility of the proposed amendment.

Whether a legal rule was clearly established at the time official action was taken depends substantially upon the level of generality at which the relevant legal rule is to be defined.” . . . [The Supreme Court] has adopted a more particularized approach to whether a right has been “clearly established,” requiring that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected . . . unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent. Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.¹⁹

Plaintiff does not argue that there is Supreme Court case law on point and concedes, as he must, that there is no Tenth Circuit law directly on point.²⁰ Instead,

¹⁸*Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006).

¹⁹*Walker*, 451 F.3d at 1151 (quoting *Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)).

²⁰Pl.’s Opp. at 6.

Plaintiff relies upon four cases²¹ from other jurisdictions to show the law was clearly established. In *Bery*, the Second Circuit held that visual artists selling four types of presumptively expressive types of art work had “full First Amendment protection” for sale of their work in public places.²²

In *Perry v. Los Angeles Police Dept.*,²³ the Ninth Circuit held that sales of music, buttons and bumper stickers bearing political, religious, and ideological messages were fully protected speech under the First Amendment. *Perry* also involved a musician and performance artist whose music the Ninth Circuit held implied religious content.²⁴ The Ninth Circuit held that because these activities were protected speech, the local ordinance banning them but allowing an exception for similar sales by nonprofit organizations implicated the Equal Protection Clause.²⁵ The difference in the type of activities at issue in *Perry* renders it of scant precedential value for the proposition Plaintiff advances as clearly established in the present case, namely that visual artists selling their visual art are protected by the First Amendment. No doubt it for this reason that the Ninth Circuit did not cite or rely on *Bery* in its *Perry* case, although it was decided nearly one year after *Bery*.

²¹*Bery, supra*; *Perry v. Los Angeles Police Dept.*, 121 F.3d 1365 (9th Cir. 1997); *White, supra*; *Celli, supra*.

²²*Bery*, 97 F.3d at 698.

²³121 F.3d at 1366-67.

²⁴*Id.*

²⁵*Id.* at 1368.

As noted above, in *Celli*, the trial court expressly declined to reach as far as the *Bery* case's holding that the four categories of visual art are protected under the First Amendment.²⁶ Instead, the *Celli* court examined the specific visual art at issue and afforded it First Amendment protection because it clearly incorporated written expression such as phrases and poems that were political parody or statements protected under the First Amendment.²⁷

The Court's clearly established analysis need not address the *White* case because it was issued on August 5, 2004,²⁸ after the alleged events in this case. Therefore it could not have formed part of the clearly established law in January 2004. Similarly, *Mastrovincenzo v. City of New York*²⁹ in which the Second Circuit applied and clarified its holding in *Bery* was decided after January 2004.

In *Walker*, the Tenth Circuit made it clear that the clearly established law analysis is to be determined by reference to case law "prior to the events in question."³⁰ In January 2004, this then was the state of case law: There were no Tenth Circuit or Supreme Court cases on point. There was one Second Circuit case holding that visual art consisting of "paintings, photographs, prints and sculptures . . . always communicate some idea or

²⁶214 F.Supp.2d at 1258.

²⁷*Id.* at 1258-59.

²⁸341 F.Supp.2d 1129.

²⁹435 F.3d 78, 94-96 (2nd Cir. 2006). The district court opinion in *Mastrovincenzo* was also issued after January 2004. See *Mastrovincenzo v. City of New York*, 313 F.Supp.2d 280 (S.D. N.Y. April 7, 2004).

³⁰451 F.3d at 1151.

concept to those who view it, and as such are entitled to full First Amendment protection.”³¹

There was one district court case that *declined* to adopt the Second Circuit’s broad holding but did afford First Amendment protection to particular artwork because it incorporated written expressions that were themselves entitled to First Amendment protection.³²

Reliance on those two cases does not meet Plaintiff’s burden of showing that there was a clearly established *weight* of authority from other courts regarding First Amendment protection for visual artists to sell art work in public places. This is true whether the type of art work is unspecified as under the present Complaint or if the art work was one of the types of art work held to be presumptively expressive under the *Bery* analysis. For even those presumptively expressive types of art work, two relevant cases, *Bery* and *Celli*, do not meet the Plaintiff’s burden of showing clearly established law by the weight of authority from other cases.

Plaintiff’s claims under the Equal Protection Clause and his claim under the Fourth Amendment right to be free of unreasonable seizures are premised on an allegation that Plaintiff was engaged in protected speech. For example, Plaintiff relies upon *Perry* for the proposition that treating street artists differently under the Ordinances than civic groups allowed to sell goods violates his rights under the Equal Protection Clause.³³ But *Perry*’s

³¹*Bery*, 97 F.3d at 696.

³²*Celli*, *supra*.

³³Pl.’s Opp. at 9, citing *Perry*, *supra*.

holding was premised on its finding that the prohibited activity was protected under the First Amendment³⁴—law that was not clearly established regarding Plaintiff’s activities.

Similarly, although Plaintiff claims that his seizure by arrest resulted from his expressive conduct, he failed to show clearly established law from which a reasonable official would have understood that Plaintiff was engaged in protected expressive conduct or that the ordinance that the official was enforcing was constitutionally infirm.

Having failed to show that there was clearly established law that selling art work was protected speech, the contours of the rights asserted by Plaintiff were not “sufficiently clear that a reasonable official would understand that what he was doing violated that right.”³⁵ Plaintiff “had the burden, in response to defendants’ motion to dismiss, of articulating such clearly-established law.”³⁶ Having failed to articulate clearly established law, it would be futile to allow Plaintiff to amend his claim as to any of the individual defendants.

“A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile.”³⁷ Accordingly, the Court will grant the Motion to Dismiss against the individual defendants in their individual capacities with prejudice.

³⁴*Perry*, 121 F.3d at 1368 (“When a government allows some forms of *protected* speech but prohibits other forms of *protected* speech, the Equal Protection Clause is implicated”) (emphasis added).

³⁵*Walker*, 451 F.3d at 1151 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)).

³⁶*Id.*

³⁷*Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) (citing *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1126 (10th Cir. 1997)).

Plaintiff contends that even if the individual Defendants are entitled to qualified immunity, municipalities and individuals sued in their official capacities cannot avail themselves of the qualified immunity defense. As to the individual defendants in their official capacity, such claims of constitutional violations against the individuals in their official capacity is equivalent to a suit against Park City (the City) itself and is to be treated as a suit against the City.³⁸

The Court agrees with Plaintiff that a municipal defendant is not entitled to qualified immunity.³⁹ “A plaintiff suing a [city] under section 1983 for the actions of one of its officers must demonstrate two elements: (1) a municipal employee committed a constitutional violation, and (2) a municipal policy or custom was the moving force behind the constitutional deprivation.”⁴⁰ A “municipality may not be held liable where there was no underlying constitutional violation by any of its officers.”⁴¹ A government policy may be manifested by the acts of its lawmakers.⁴²

In the present case the Ordinances are the acts of the City’s lawmakers and the Court cannot say on the present record that it would be futile to grant Plaintiff leave to

³⁸*Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

³⁹*Walker*, 451 F.3d at 1152.

⁴⁰*Id.* (quoting *Myers v. Okla. County Bd. of County Com’rs*, 151 F.3d 1313, 1318 (10th Cir. 1998)).

⁴¹*Id.* (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)).

⁴²*Monell v. Dept. of Soc. Services.*, 436 U.S. 658, 964 (1978).

amend his Complaint against the City. Any claims against the individuals in their official capacities will be considered as part of the claim against the City.

As to Plaintiff's claims under the Utah Constitution, Plaintiff has clarified that he seeks only unspecified "equitable relief" on those claims.⁴³ Commonly, equitable relief in the form of an injunction is sought where there is a claim of a constitutional violation. It is not clear if such prospective injunctive relief is the "equitable relief" Plaintiff seeks under the Utah Constitution.

Plaintiff cites no law and makes no argument regarding his claims for violations of his rights to expression, equal protection, and freedom from unreasonable seizures under the Utah Constitution. The Court finds that his Complaint fails to state a basis for these claims under the Utah Constitution. But on the record at this early stage of the action, the Court cannot find that it would be futile to grant him leave to amend his Complaint regarding claims under the Utah Constitution.

Based upon the foregoing, it is therefore

ORDERED that Plaintiff's Motion for Strike Errata and Portions of Reply Memo (Docket No. 22) is DENIED. It is further

ORDERED that Defendants' Motion to Dismiss (Docket No. 11) is GRANTED with prejudice as to Defendants Shauna Stoke, in her individual capacity, Ron King, in his individual capacity, and Wayne Young in his individual capacity. It is further

⁴³Pl.'s Opp. at 7 and n.8.


ORDERED that Defendants' Motion to Dismiss (Docket No. 11) is GRANTED without prejudice as to Defendant Park City Municipal Corporation and Defendants Stoke, in her official capacity as Park City Code Enforcement Officer, King, in his official capacity as a Park City Police Officer, and Young, in his official capacity as a Park City Police Officer. It is further

ORDERED that Plaintiff's request for leave to amend his Complaint is DENIED as to the individual Defendants in their individual capacities but is OTHERWISE GRANTED. It is further

ORDERED that Plaintiff has twenty days from the entry of the Order to file such any such amended complaint.

DATED September 15, 2006.

BY THE COURT:



TED STEWART
United States District Judge

Heidi E. C. Leithead (5102)
Cheylynn Hayman (9793)
PARR WADDOUPS BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, UT 84111
Telephone: 801/532-7840
Telefax: 801/532-7750

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CINDY LEWIS,	)	Civil Action No. 2:06-cv-208 TS
)	
Plaintiff,	)	SCHEDULING ORDER AND
	)	ORDER VACATING HEARING
vs.)	
	)	Magistrate Judge David Nuffer
CDI MEDIA, INC.,)	
	)	Magistrate Judge Brooke C. Wells
Defendant.	)	(for purposes of scheduling order only)

Pursuant to Fed. R. Civ P. 16(b), the Magistrate Judgeⁱ received the Attorneys' Planning Report filed by counsel. The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

IT IS ORDERED that the Initial Pretrial Hearing set for October 11, 2006, at 2:30 PM is VACATED.

****ALL TIMES 4:30 PM UNLESS INDICATED****

1.	PRELIMINARY MATTERS	DATE
	Nature of claims and any affirmative defenses:	
	Claim: Age Discrimination in Employment	
	Affirmative Defenses: failure to state a claim; failure to	
	mitigate damages (if any); even had Defendant	

considered plaintiff's age, it would have taken the same job action in any event; estoppel and/or waiver; Defendant's actions were based on reasonable factors other than age; Defendant did not willfully discrimination against Plaintiff; Plaintiff has failed to state a valid claim for punitive damages or front pay; and Plaintiff's claims are subject to mandatory arbitration

a.	Was Rule 26(f)(1) Conference held?	Yes	<u>8/14/06</u>
b.	Has Attorney Planning Meeting Form been submitted?	Yes	<u>8/15/06</u>
c.	Was 26(a)(1) initial disclosure completed?	To be done	<u>8/28/06</u>

2.	DISCOVERY LIMITATIONS	NUMBER
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a.	Maximum Number of Depositions by Plaintiff(s)	<u>10</u>
b.	Maximum Number of Depositions by Defendant(s)	<u>10</u>
c.	Maximum Number of Hours for Each Deposition (unless extended by agreement of parties)	<u>7</u>
d.	Maximum Interrogatories by any Party to any Party	<u>25</u>
e.	Maximum requests for admissions by any Party to any Party	<u>25</u>
f.	Maximum requests for production by any Party to any Party	<u>25</u>

3.	AMENDMENT OF PLEADINGS/ADDING PARTIES	DATE
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a.	Last Day to File Motion to Amend Pleadings	Plaintiff	<u>12/15/06</u>
		Defendant	<u>12/31/06</u>
b.	Last Day to File Motion to Add Parties	Plaintiff	<u>12/15/06</u>
		Defendant	<u>12/31/06</u>

ii

4.	RULE 26(a)(2) REPORTS FROM EXPERTS	DATE
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a.	Plaintiff	<u>3/1/07</u>
b.	Defendant	<u>3/1/07</u>
c.	Counter reports	<u>3/15/07</u>

iii

5.	OTHER DEADLINES	DATE
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a.	Discovery to be completed by:	
	Fact discovery	<u>2/15/07</u>
	Expert discovery	<u>4/30/07</u>
b.	(optional) Final date for supplementation of disclosures and discovery under Rule 26 (e)	<u>1/15/07</u>
c.	Deadline for filing dispositive or potentially dispositive motions	<u>6/15/07</u>

6. **SETTLEMENT/ALTERNATIVE DISPUTE RESOLUTION** **DATE**
- a. Referral to Court-Annexed Mediation: No
- b. Referral to Court-Annexed Arbitration No
- c. Evaluate case for Settlement/ADR on 2/15/07
- d. Settlement probability: Unknown

*Specify # of days for Bench or Jury trial as appropriate.
Shaded areas will be completed by the court.*

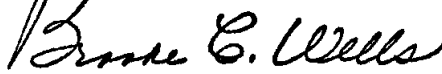
7. **TRIAL AND PREPARATION FOR TRIAL** **TIME** **DATE**
- a. Rule 26(a)(3) Pretrial Disclosures
- Plaintiff 9/10/07
- Defendant 9/24/07
- b. Objections to Rule 26(a)(3) Disclosures 00/00/00
(if different than 14 days provided in Rule)
- c. Special Attorney Conference on or before 10/8/07
- d. Settlement Conference on or before 00/00/00
- e. Final Pretrial Conference 2:30 PM 10/22/07
- f. Trial Length
- i. Bench Trial Not Applicable : .m. 00/00/00
- ii. Jury Trial 5 days 8:30 AM 11/5/07

8. **OTHER MATTERS**

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

^{vi}Dated this 15 date of September, 2006.

BY THE COURT:



Brooke C. Wells
U.S. Magistrate Judge

ⁱ The Magistrate Judge completed Initial Pretrial Scheduling under DUCivR 16-1(b) and DUCivR 72-2(a)(5). The name of the Magistrate Judge who completed this order should NOT appear on the caption of future pleadings, unless the case is separately referred to that Magistrate Judge. A separate order may refer this case to a Magistrate Judge under DUCivR 72-2 (b) and 28 USC 636 (b)(1)(A) or DUCivR 72-2 (c) and 28 USC 636 (b)(1)(B). The name of any Magistrate Judge to whom the matter is referred under DUCivR 72-2 (b) or (c) should appear on the caption as required under DUCivR10-1(a).

ⁱⁱ Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).

ⁱⁱⁱ **Error! Main Document Only.**A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.

^{iv} Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.

^v The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special equipment or courtroom arrangement requirements will be included in the pre-trial order.

^{vi} The Settlement Conference does not involve the Court unless a separate order is entered. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF UTAH

ANITA L. SAVAGE,	:	SCHEDULING ORDER AND
	:	ORDER VACATING HEARING
Plaintiff,	:	
vs.	:	
	:	Case No. 2:06CV391 DAK
EXPERIAN INFORMATION SOLUTIONS,	:	
INC., an Ohio Corporation,	:	District Judge Dale A. Kimball
	:	
Defendant.	:	Magistrate Judge Brooke C. Wells

VS.

EXPERIAN INFORMATION SOLUTIONS,
INC., an Ohio Corporation,

SCHEDULING ORDER AND ORDER VACATING HEARING

District Judge Dale A. Kimball

Magistrate Judge Brooke C. Wells

IT IS ORDERED that the Initial Pretrial Hearing set for October 11, 2006, at 1:30 p.m. is VACATED.

1. PRELIMINARY MATTERS **DATE**

a.	Was Rule 26(f)(1) Conference held?	9/7/06
b.	Has Attorney Planning Meeting Form been submitted?	9/8/06
c.	Was 26(a)(1) initial disclosure completed?	10/23/05

2.	DISCOVERY LIMITATIONS	NUMBER
----	-----------------------	--------

153121v1

e.	Maximum requests for admissions by any Party to any Party	<u>30</u>
f.	Maximum requests for production by any Party to any Party	<u>30</u>
3.	AMENDMENT OF PLEADINGS/ADDING PARTIES	DATE
a.	Last Day to File Motion to Amend Pleadings	<u>11/1/06</u>
b.	Last Day to File Motion to Add Parties	<u>11/1/06</u>
2		
4.	RULE 26(a)(2) REPORTS FROM EXPERTS	DATE
a.	Plaintiff	<u>11/1/06</u>
b.	Defendant	<u>11/15/06</u>
c.	Counter reports	<u>12/1/06</u>
3		
5.	OTHER DEADLINES	DATE
a.	Discovery to be completed by:	
	Fact discovery	<u>1/8/07</u>
	Expert discovery	<u>1/15/07</u>
b.	(optional) Final date for supplementation of disclosures and discovery under Rule 26 (e)	<u>NA</u>
c.	Deadline for filing dispositive or potentially dispositive motions	<u>1/22/07</u>
6.	SETTLEMENT/ALTERNATIVE DISPUTE RESOLUTION	DATE
a.	Referral to Court-Annexed Mediation:	<u>Yes</u>
b.	Referral to Court-Annexed Arbitration	<u>No</u>
c.	Evaluate case for Settlement/ADR on	<u>1/9/07</u>
d.	Settlement probability:	<u>Poor</u>

*Specify # of days for Bench or Jury trial as appropriate.
Shaded areas will be completed by the court.*

7.	TRIAL AND PREPARATION FOR TRIAL	TIME	DATE
a.	Rule 26(a)(3) Pretrial Disclosures		
	Plaintiff		<u>4/23/07</u>
	Defendant		<u>5/7/07</u>
b.	Objections to Rule 26(a)(3) Disclosures (if different than 14 days provided in Rule)		<u>00/00/00</u>
c.	Special Attorney Conference on or before		<u>5/21/07</u>
d.	Settlement Conference on or before		<u>00/00/00</u>
e.	Final Pretrial Conference	<u>2</u> :30 p.m.	<u>6/4/07</u>
f.	Trial	<u>Length</u>	
	i. Bench Trial	<u> </u> : <u> </u> .m.	<u>00/00/00</u>
	ii. Jury Trial	8:30 am	<u>6/18/07</u>

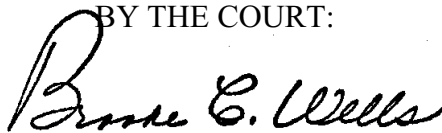
4

8. OTHER MATTERS

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

⁵⁶Dated this 15 date of September, 2006 .

BY THE COURT:



Brooke C. Wells
U.S. Magistrate Judge

¹ The Magistrate Judge completed Initial Pretrial Scheduling under DUCivR 16-1(b) and DUCivR 72-

2(a)(5). The name of the Magistrate Judge who completed this order should NOT appear on the caption of future pleadings, unless the case is separately referred to that Magistrate Judge. A separate order may refer this case to a Magistrate Judge under DUCivR 72-2 (b) and 28 USC 636 (b)(1)(A) or DUCivR 72-2 (c) and 28 USC 636 (b)(1)(B). The name of any Magistrate Judge to whom the matter is referred under DUCivR 72-2 (b) or (c) should appear on the caption as required under DUCivR10-1(a).

² Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).

³ A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.

⁴ Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.

⁵ The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special equipment or courtroom arrangement requirements will be included in the pre-trial order.

⁶ The Settlement Conference does not involve the Court unless a separate order is entered. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

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SEP 11 2006

OFFICE OF U.S. DISTRICT JUDGE
BRUCE S. JENKINS

FILED
U.S. DISTRICT COURT

2006 SEP 13 P 2:26

CLERK OF COURT
FEDERAL BUILDING
SALT LAKE CITY, UT 84111

PHILLIP Wm. LEAR, # 1914
DENNIS C. FARLEY, #1034
Lear & Lear L.L.P.
299 South Main, Suite 2200
Wells Fargo Center
Salt Lake City, UT 84111
Telephone: (801) 538-5000
Fax: (801) 538-5001
phillip.lear@learlaw.com
dennis.farley@learlaw.com

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CHRISTIAN F. MURER

Plaintiff,

v.

PLATEAU RESOURCES LIMITED, INC.

Defendant.

SCHEDULING ORDER

Civil No. 2:06cv00393 BJS
Judge Bruce S. Jenkins

This matter having come before the court for an Initial Status and Scheduling Order on August 29, 2006, before The Honorable Bruce S. Jenkins, Dennis C. Farley having appeared for Plaintiff and Daniel E. Barnett having appeared for Defendant, the following Scheduling Order was entered:

1. **INITIAL DISCLOSURES.** The initial disclosures required by Rule 26(a)(1) will be made by September 15, 2006.

2. **AMENDMENTS AND JOINDER.** Amendments to the pleadings and joinder of additional parties shall occur no later than October 16, 2006.

3. **DISCOVERY PLAN.**

(a) Discovery is necessary on all issues raised in the pleadings and within the scope of permissible discovery under Rule 26 of the Federal Rules of Civil Procedure.

(b) Discovery may begin immediately and shall be completed on or before January 31, 2007.

4. **LIMITATIONS ON DISCOVERY.** The limitations on discovery posed by the Federal Rules of Civil Procedure are unaltered, unless otherwise agreed by the parties or ordered by the court.

5. **MOTIONS.** Dispositive motions shall be filed on or before February 15, 2007.

6. **DEADLINE FOR ALLOCATING FAULT TO A NON-PARTY.** The deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party shall be November 1, 2006.

7. **FINAL PRETRIAL HEARING.** A final pretrial hearing is set for Friday, April 13, 2007, at 9:30 a.m. A proposed pretrial order will be filed by the parties no later than Thursday, April 11, 2007.

8. **SETTLEMENT.** The potential for settlement is fair.

DATED this 22 day of Sept, 2006.

BY THE COURT:



Honorable Bruce S. Jenkins

Approved as to form:

LEAR & LEAR, L.L.P.

/s/ Dennis C. Farley_____

Philip Wm. Lear

Dennis C. Farley

(Signed by Filing Attorney with permission of Plaintiff Attorney)

Date

PARR WADDOUPS BROWN GEE
& LOVELESS

/s/ Other Attorney_____

Daniel A. Jensen

Daniel E. Barnett

(Signed copy of document bearing signature of Other Attorney is being maintained in the office of the Filing Attorney)

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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OFFICE OF U.S. DISTRICT JUDGE
BRUCE S. JENKINS

LANDESK DEVELOPMENT, INC., a
Delaware corporation,

Plaintiff,

vs.

FRONTRANGE SOLUTIONS USA,
INC., a Colorado corporation,

Defendant.

Civil No. 2:06-CV-0408J

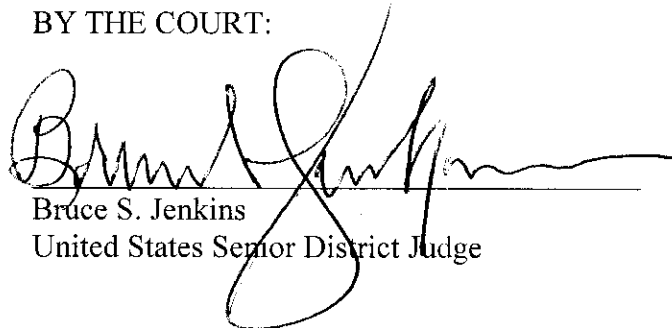
ORDER OF DISMISSAL

Based on Plaintiff's Notice of Dismissal filed on September 13, 2006,

IT IS ORDERED that the above-entitled action is **dismissed** pursuant to Rule 41(a)(1)
of the Federal Rules of Civil Procedure.

DATED this 15 day of September, 2006.

BY THE COURT:



Bruce S. Jenkins
United States Senior District Judge

Randall B. Bateman (USB 6482)
Perry S. Clegg (USB 7831)
BATEMAN IP LAW GROUP, P.C.
8 East Broadway, Suite 550
P.O. Box 1319
Salt Lake City, Utah 84110
Tel: (801) 533-0320 / Fax: (801) 533-0323
Email: mail@batemanip.com

Attorneys for Plaintiff,
WASATCH HOMES, LLC

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SEP 11 2006

OFFICE OF U.S. DISTRICT JUDGE
BRUCE S. JENKINS

FILED
U.S. DISTRICT COURT

2006 SEP 13 P 2:27

CLERK OF COURT

CLERK OF COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

WASATCH HOMES, LLC, a Utah Limited
Liability Company,

Plaintiff,

vs.

HIGH COUNTRY APACHE BUILDERS, INC.
d.b.a. APACHE BUILDERS, INC., a Utah
Corporation; FREEDOM DESIGN, L.L.C., a Utah
Limited Liability Company; GARY DEROSE and
DOES 1 through 5,

Defendants.


SCHEDULING ORDER

Case No. 2:06cv00409BSJ

Judge Bruce S. Jenkins

Pursuant to Fed. R. Civ. P. 16(b), The Honorable Bruce Jenkins conducted a scheduling conference on September 1, 2006 in the matter cited above. The following matters were discussed and scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

I. DISCLOSURES

A. Rule 26(a) disclosures shall be completed on 9/29/06 

B. Reports from experts under Rule 26(a)(2) will be submitted on April 19, 2007.

Rebuttal reports will be submitted by 05/02/07.

II. DISCOVERY, AMENDMENTS AND SUPPLEMENTATION

A. The deadline for adding a party and/or amending the pleadings shall be 01/31/07.

B. Supplementation of disclosures under Rule 26(a)(3) and of discovery under Rule 26(e) - 03/05/07.

C. Fact Discovery shall be completed by 04/05/07.

D. Expert Discovery shall be completed by 06/08/07, with expert reports being due 04/19/07 and rebuttal reports being due 05/02/07.

E. Discovery shall have the following limitations.

1. Maximum depositions by Plaintiff - 10.
2. Maximum depositions by Defendants - 10.
3. Maximum interrogatories - 50 per side.
4. Maximum requests for admission - Unlimited.
5. Maximum requests for production of documents - 50 per side.

III. PRETRIAL

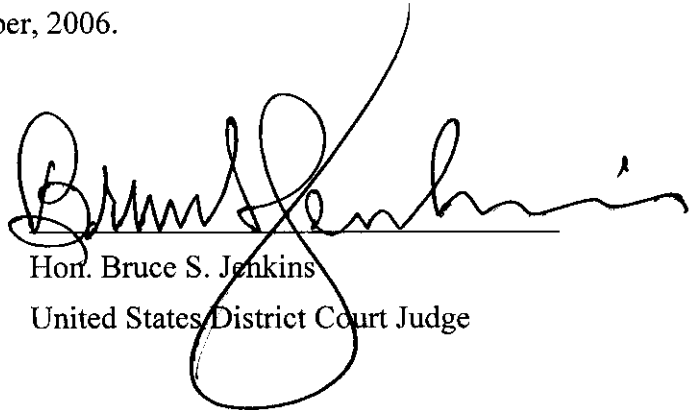
A. All post discovery potentially dispositive motions shall be filed by 06/29/07

B. An agreed form pretrial order shall be submitted, with rosters of witnesses and exhibits shall be submitted by 08/15/07

C. The pretrial conference shall be held on 08/17/07 at 9:30 a.m..

D. The case should be ready for a three day jury trial by 09/27/07

Dated this 12 day of September, 2006.



Hon. Bruce S. Jenkins
United States District Court Judge

Approved as to form:

Randall B. Bateman, Attorney for Plaintiff,
Wasatch Homes, LLC

Grant R. Clayton, Attorney for Defendants,
High Country Apache Builders, Inc. and Gary DeRose

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SEP 11 2006 U.S. DISTRICT COURT

OFFICE OF U.S. DISTRICT JUDGE
BRUCE S. JENKINS SEP 13 P 2:27

CLERK

JAMES W. PALMER, #6959
Assistant Attorney General
MARK L. SHURTLEFF, #4666
Utah Attorney General
160 East 300 South, 5th Floor
P.O. Box 140872
Salt Lake City, UT 84114-0872
Telephone: (801) 366-0310
Facsimile: (801) 366-0315
Attorneys for State of Utah

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION**

STATE OF UTAH,

Plaintiff,

vs.

**INTELECT TECHNOLOGIES, INC.;
POWER & TELEPHONE SUPPLY
COMPANY; and, INTELLI-SITE
INC.;**

Defendants.

**ORDER TO DISMISS
POWER AND TELEPHONE SUPPLY
COMPANY**

Case No. 2:06cv00547 BSJ

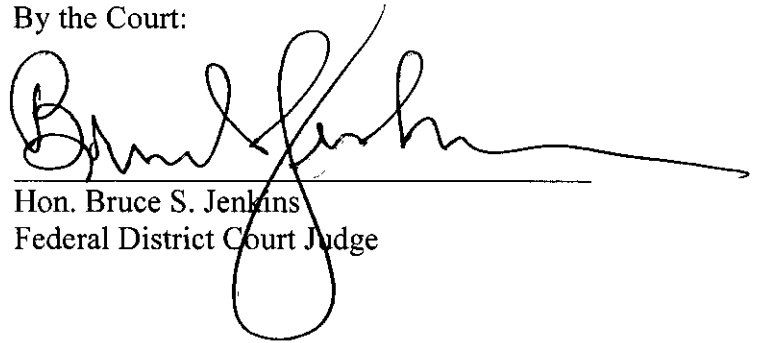
Judge: Bruce S. Jenkins

Based on the Stipulation and Joint Motion of the plaintiff State of Utah and
defendant Power and Telephone Supply Company, pursuant to Rule 41 of the Federal
Rules of Civil Procedure, and for good cause shown;

It is hereby ORDERED that all claims and counterclaims in this matter are hereby dismissed with prejudice, each party to bear their own attorneys' fees and costs.

DATED this 12 day of Sept, 2006.

By the Court:

A handwritten signature in black ink, appearing to read "Bruce S. Jenkins", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Hon. Bruce S. Jenkins
Federal District Court Judge

FILED
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

2006 SEP 14 P 4: 26

DISTRICT OF UTAH

Equal Employment Opportunity Commission, :

Case No. 2:06-CV-00751-DAK

Plaintiff,

ORDER FOR PRO HAC VICE
ADMISSION

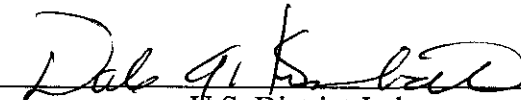
v.

Hamlet Development Corp., *et al.*

Defendant.

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Loretta F. Medina in the United States District Court, District of Utah in the subject case is GRANTED.

Dated: this 14th day of September, 2006.


U.S. District Judge

FILED
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

2006 SEP 14 P 4: 26

CLERK OF COURT

Equal Employment Opportunity Commission, :

Plaintiff, :

v. :

Hamlet Development Corp., *et al.* :

Defendant. :

Case No. 2:06-CV-00751-DAK

ORDER FOR PRO HAC VICE
ADMISSION

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Mary Jo O'Neill in the United States District Court, District of Utah in the subject case is GRANTED.

Dated: this 14th day of September, 2006.


U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

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U.S. DISTRICT COURT

2006 SEP 14 P 4:26

DISTRICT OF UTAH

Equal Employment Opportunity Commission, :

Plaintiff, :

v. :

Hamlet Development Corp., *et al.* :

Defendant. :

Case No. 2:06-CV-00751-DAK

ORDER FOR PRO HAC VICE
ADMISSION

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Sally C. Shanley in the United States District Court, District of Utah in the subject case is GRANTED.

Dated: this 14th day of September, 2006.


U.S. District Judge

MEMORANDUM

TO: Markus Zimmer
Clerk of the Court

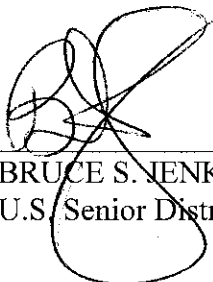
FROM: Bruce S. Jenkins
U.S. Senior District Judge

DATE: September 12, 2006

SUBJECT: Campbell v. Social Security Administration
Case No. 2:06-CV-759

I find I must recuse myself from this case.

Would you please see that this case is reassigned to another judge pursuant to our computer program.



BRUCE S. JENKINS
U.S. Senior District Judge

Judge Paul G. Cassell
DECK TYPE: Civil
DATE STAMP: 09/14/2006 @ 14:23:51
CASE NUMBER: 2:06CV00759 PGC

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

PRESTON SCOTT WALLACE,

Plaintiff,

v.

SCOTT CARVER et al.,

Defendants.

Judge David Sam

DECK TYPE: Civil

DATE STAMP: 09/14/2006 @ 10:49:22

CASE NUMBER: 2:06CV00780 DS

FILED
DISTRICT COURT
2006 SEP 14 A 10:30

DISTRICT OF UTAH

CLERK

Plaintiff, Preston Scott Wallace, an inmate at Utah State Prison, has filed a *pro se* civil rights complaint.¹ The filing fee is \$350.² However, Plaintiff asserts he is unable to prepay the filing fee. He thus applies to proceed without prepaying the filing fee and submits a supporting affidavit.³

The Court grants Plaintiff's request to proceed without prepaying the entire filing fee. Even so, Plaintiff must eventually pay the full \$350.00.⁴ Plaintiff must start by paying "an initial partial filing fee of 20 percent of the greater of . . . the average monthly deposits to [his prison] account . . . or . . . the average monthly balance in [his prison] account for the 6-month period immediately preceding the filing of the complaint."⁵ Under this formula, Plaintiff must pay \$20.06. If

¹See 42 U.S.C.S. § 1983 (2006).

²See 28 *id.* § 1914(a).

³See *id.* § 1915(a).

⁴See *id.* § 1915(b)(1).

⁵*Id.*

this initial partial fee is not paid within thirty days, or if Plaintiff has not shown he has no way to pay it, the complaint will be dismissed.

Plaintiff must also complete the attached "Consent to Collection of Fees" form and submit the original to the inmate funds accounting office and a copy to the Court within thirty days so the Court may collect the balance of the filing fee. Plaintiff is notified that, based on Plaintiff's consent form submitted to this Court, Plaintiff's correctional institution will make monthly payments from Plaintiff's inmate account of twenty percent of the preceding month's income credited to Plaintiff's account.

IT IS THEREFORE ORDERED that:

(1) Plaintiff may proceed without prepaying his filing fee; however, he must eventually pay the full filing fee of \$350.00.

(2) Plaintiff must pay an initial partial filing fee of \$20.06 within thirty days, or his complaint will be dismissed.

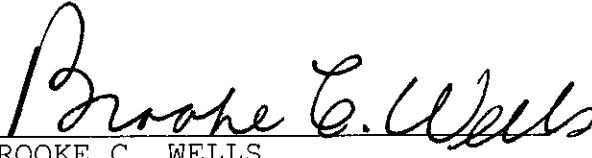
(3) Plaintiff must make monthly payments of twenty percent of the preceding month's income credited to Plaintiff's account.

(4) Plaintiff shall make the necessary arrangement to give a copy of this Order to the inmate funds accounting office or other appropriate office at Plaintiff's correctional facility.

(5) Plaintiff shall complete the consent to collection of fees and submit it to his correctional institution's inmate funds accounting office and also submit a copy of the signed consent to this Court within thirty days from the date of this Order or the complaint will be dismissed.

DATED this 13 day of September, 2006.

BY THE COURT:


BROOKE C. WELLS
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CONSENT TO COLLECTION OF FEES FROM INMATE TRUST ACCOUNT

I, Preston Scott Wallace, understand that even though the Court has granted my application to proceed *in forma pauperis* and filed my complaint, I must still eventually pay the entire filing fee of \$350.00. I understand that I must pay the complete filing fee even if my complaint is later dismissed.

I, Preston Scott Wallace, hereby consent for the appropriate institutional officials to withhold from my inmate account and pay to the court an initial payment of \$20.06, which is 20% of the greater of:

- (a) the average monthly deposits to my account for the six-month period immediately preceding the filing of my complaint or petition; or
- (b) the average monthly balance in my account for the six-month period immediately preceding the filing of my complaint or petition.

I further consent for the appropriate institutional officials to collect from my account on a continuing basis each month, an amount equal to 20% of each month's income. Each time the amount in the account reaches \$10, the Trust Officer shall forward the interim payment to the Clerk's Office, U.S. District Court for the District of Utah, 350 South Main, #150, Salt Lake City, UT 84101, until such time as the \$350.00 filing fee is paid in full.

By executing this document, I also authorize collection on a continuing basis of any additional fees, costs, and sanctions imposed by the District Court.

Signature of Inmate
Preston Scott Wallace